

# AMERICAN BAR ASSOCIATION JOURNAL

VOL. XXII

MARCH, 1936

NO. 3

## **"Abraham Lincoln . . Profession a Lawyer"**

BY HON. WILLIAM L. RANSOM

## **Historic New England Shrines of the Law—II.**

BY GEORGE R. FARNUM

## **Power of Federal Courts to Declare Acts of Congress Unconstitutional**

BY HON. JOHN H. HATCHER

## **The Influence of Thomas Allen and the "Berkshire Con- stitutionalists"**

BY FRANK W. GRINNELL

## **The Proposed United States Administrative Court**

BY O. R. McGUIRE

## **Review of Recent Supreme Court Decisions**

BY EDGAR BRONSON TOLMAN

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# ANNUAL STATEMENTS

December 31, 1935

## ÆTNA LIFE INSURANCE COMPANY AND AFFILIATED COMPANIES

MORGAN B. BRAINARD, President

### 86th Annual Statement Ætina Life Insurance Company Capital Stock \$15,000,000

ASSETS	
Cash on hand and in banks	\$ 21,346,051.87
Real estate (including Home Office Building)	36,548,467.62
Mortgage loans	47,283,632.81
Loans on collateral	145,000.00
*Bonds and stocks	299,179,309.64
Loans secured by policies of this Company	72,792,007.61
Premiums in course of collection and deferred premiums	17,493,100.71
Interest due and accrued	8,283,102.15
Other assets	407,844.25
<b>Total admitted assets</b>	<b>\$503,478,516.66</b>
LIABILITIES	
Reserve under policy contracts	\$418,781,999.55
Premium reserve, Accident and Liability Department	7,861,583.88
Reserve for claims awaiting proof and not yet due	10,942,800.06
Reserve for liability and workmen's compensation claims	14,473,705.20
Reserve for dividends payable to policyholders	6,488,748.30
Premiums paid in advance and other liabilities to policyholders	4,304,741.17
<b>Total liability under policy contracts</b>	<b>\$462,853,578.16</b>
Reserve for taxes not yet due	2,803,077.38
Miscellaneous liabilities	6,640,115.81
Contingency reserve	4,600,000.00
<b>Total liabilities</b>	<b>\$474,896,771.35</b>
Surplus to policyholders:	
Capital	\$15,000,000.00
Surplus	13,581,745.31
<b>Total</b>	<b>\$503,478,516.66</b>

### 26th Annual Statement The Standard Fire Insurance Company Capital Stock \$1,000,000

ASSETS	
Cash on hand and in banks	\$ 515,892.05
*Bonds and stocks	4,177,783.33
Agents' balances	296,056.62
Interest due and accrued	29,983.35
Other assets	9,497.14
<b>Total admitted assets</b>	<b>\$5,029,212.49</b>
LIABILITIES	
Premium reserve	\$1,795,119.52
Losses in adjustment	136,024.69
Reserve for taxes	95,921.69
All other liabilities	53,432.50
Contingency reserve	300,000.00
<b>Total liabilities</b>	<b>\$2,380,498.40</b>
Surplus to policyholders:	
Capital	\$1,000,000.00
Surplus	1,648,714.09
<b>Total</b>	<b>\$5,029,212.49</b>

### 29th Annual Statement The Ætina Casualty & Surety Company Capital Stock \$3,000,000

ASSETS	
Cash on hand and in banks	\$ 3,990,244.37
Real estate acquired by foreclosure	395,789.00
Mortgage loans	642,110.82
*Bonds and stocks	29,401,009.24
Premiums in collection	4,252,289.53
Interest due and accrued	344,111.78
Other assets	326,280.67
<b>Total admitted assets</b>	<b>\$39,251,835.41</b>
LIABILITIES	
Premium reserve	\$11,512,102.35
Losses in adjustment	8,431,980.21
Commission reserve	868,779.51
Reserve for taxes	831,073.00
All other liabilities	1,562,386.14
Contingency reserve	2,000,000.00
<b>Total liabilities</b>	<b>\$25,206,321.21</b>
Surplus to policyholders:	
Capital	\$ 3,000,000.00
Surplus	11,045,514.20
<b>Total</b>	<b>\$39,251,835.41</b>

### 23rd Annual Statement The Automobile Insurance Company of Hartford, Connecticut Capital Stock \$5,000,000

ASSETS	
Cash on hand and in banks	\$ 2,202,390.15
Real estate acquired by foreclosure	83,445.00
Mortgage loans	25,800.00
*Bonds and stocks	16,670,697.79
Agents' balances	1,731,913.76
Interest due and accrued	85,242.59
Other assets	544,786.57
<b>Total admitted assets</b>	<b>\$21,344,275.86</b>
LIABILITIES	
Premium reserve	\$6,012,899.45
Losses in adjustment	1,382,246.23
Reserve for taxes	499,082.56
All other liabilities	473,398.80
Special reserve	1,125,000.00
Contingency reserve	925,000.00
<b>Total liabilities</b>	<b>\$10,417,637.04</b>
Surplus to policyholders:	
Capital	\$5,000,000.00
Surplus	5,926,648.82
<b>Total</b>	<b>\$21,344,275.86</b>

\*Bonds not in default are carried at amortized values; bonds in default and stocks are carried at market values except stocks of affiliated companies, which are carried at their own book value.

Paid to or for policyholders since organization	\$1,525,001,096.38
Total income — all companies — 1935	174,840,088.06
New Life Insurance paid for in 1935	700,460,775.00
Life Insurance in force	3,524,514,246.00





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F. O. RICHEY			

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# AMERICAN BAR ASSOCIATION JOURNAL

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## • *Current Events* •

### *Special Committees to Cooperate Against Improper Trial Publicity*

HON. Newton D. Baker, of Cleveland, Ohio, former Secretary of War, has accepted the Chairmanship of the Association's Special Committee on Cooperation Between the Press, Radio, and Bar against publicity interfering with fair trial of judicial and quasi-judicial proceedings. The creation of this Special Committee to define standards to be recommended to lawyers, newspapers, and radio broadcasters in the matter of publicity as to Court trials is an outcome of the incidents arising in the course of the Bruno Hauptmann trial and various proceedings before governmental boards and bodies, and it is hoped that such standards can be made effective through rules of Court or through legislation.

The other members of the Committee, as announced by the Association, are: J. W. Farley, Boston lawyer and newspaper publisher; John G. Jackson, of New York; Merritt Lane, of Newark; former Chancellor of New Jersey; Oscar Hallam, former Associate Justice of the Supreme Court of Minnesota; dean of the St. Paul College of Law; Giles J. Patterson, of Jacksonville, former president of the Florida Bar Association.

"The Chairman and members of this Special Committee," declared President Ransom of the Association, "have undertaken its difficult tasks as a matter of high public duty. Obviously the

lawyers should take the lead in this matter, to put their own house in order. The Courts can help greatly, through their control over the conduct of lawyers as officers of the Court."

Judge Ransom added that the questions to be considered by the Committee are in no sense limited to those arising out of the trial of Bruno Hauptmann. "The fact is," said he, "that although the incidents alleged as to the Hauptmann trial received wide attention and discussion, they were not solitary or aggravated. The real problem goes much deeper and reflects a general trend. Both in hearings before governmental boards and bodies and in trials of civil and criminal cases, the processes of publicity are often resorted to, in order deliberately to create atmosphere prejudicial to fair and impartial hearing and determination on the merits. The integrity and impartiality of the trial is deliberately destroyed through a barrage of publicity 'releases' giving a biased and interested view of the issues pending. The rights of persons and property cannot be fairly determined when the atmosphere of trial is thus poisoned by the wilful circulation of prejudicial publicity.

"It may be that the Courts and the lawyers could and should act to end these abuses, through suitable rules and vigorous action against offenders. The cooperation of the press and radio is needed, in determining what those disciplinary standards should be. Excessive and prejudicial publicity is prevented from interfering with fair trials

in England. The United States needs to find the feasible way of accomplishing the same result here. The new Committee of the American Bar Association, under Mr. Baker's sure-footed leadership, may be able to help."

Mr. Grove Patterson, Editor of The Toledo (Ohio) Blade and president of The American Society of Newspaper Editors, has appointed the following Committee from that Society, to cooperate with the American Bar Association's Special Committee concerning excessive publicity interfering with fair trial of judicial and quasi-judicial proceedings:

Stuart H. Perry, Adrian, Michigan Telegram, *Chairman*; Tom Wallace, Louisville Times, Louisville, Kentucky; O. S. Warden, Great Falls, Montana Tribune; David Lawrence, United States News, Washington, D. C.; Albert O. H. Grier, Wilmington, Delaware, Journal-Every Evening.

President Jerome D. Barnum of the American Newspaper Publishers Association has appointed the following Committee to cooperate with the Special Committee of the American Bar Association: Paul Bellamy, Editor, Cleveland Plain Dealer, *Chairman*; Emanuel Levi, General Manager Louisville Courier Journal; R. R. McCormick, President and Publisher Chicago Tribune; J. R. Knowland, President and Publisher Oakland Tribune; A. H. Sulzberger, President and Publisher New York Times; W. F. Wiley, Publisher and Editor, Cincinnati Enquirer.

### *Special Committee to Report on Federal Legislation*

WITH the vacancies filled, the following constitute the Association's Special Committee to study and report as to Federal legislation and policies affecting the rights and liberties of citizens:

JUSTICE JAMES G. MCGOWEN, Jackson, Mississippi, *Chairman*;

GEORGE L. BUIST, Charleston, South Carolina;

JOHN D. CLARK, Cheyenne Wyoming;

JUSTICE FRED H. DAVIS, Tallahassee, Florida;

CHARLES P. TAFT, 2ND, Cincinnati, Ohio;

FRED L. WILLIAMS, St. Louis, Missouri;

JUSTICE KENNETH WYNNE, New Haven, Connecticut.

The General Council and Executive Committee, at their January meeting in Chicago, voted that the vacancies caused by resignations from the Committee should be filled, and that the Committee should be asked to make an early report. The Committee was created by a resolution adopted by the Milwaukee convention in 1934, upon the recommendation of the General Council and Executive Committee. The Committee did not agree upon and submit a report in Los Angeles last July, and the convention voted to continue the Committee.

Of the new members of the Committee, Chairman McGowen is a Justice of the Supreme Court of Mississippi, and represented the Methodist Church

South as a member of the Unification Commission which developed a plan for the unification of the Methodist Episcopal Church in the North and South. Justice Davis has served as Attorney-General of Florida, and is now a Justice of the Supreme Court of Florida, of which he has been Chief Justice under the rotation plan. Mr. Williams has been a Justice of the Supreme Court of Missouri. Justice Wynne was Executive Secretary to Governor Simeon E. Baldwin and later to Governor Wilbur L. Cross, of Connecticut. He now is a Justice of the Superior Court of Connecticut.

In announcing his selections to fill the vacancies, the President of the Association said that he had believed that he should not appoint men who have been identified with litigation or controversy as to the matters to be surveyed by the Committee.

### *President Ransom's Engagements*

ON Saturday evening, February 29th, the President of the American Bar Association will address the annual dinner of the Onondaga County Bar Association, at Syracuse, New York. Representatives of other Bar Associations in upstate New York will also attend.

On March 4th, President Ransom will address a dinner of the Federal Bar Association in Washington, D. C., of which Assistant Attorney-General Justin Miller is the President.

On March 7th, he will speak before the Eastern Law Students' Conference,

at the New York University School of Law, on "Pre-Bar Acquaintance with Bar Association Work."

On Saturday, March 14th, the President of the American Bar Association will be the guest speaker before the Canadian Club, at the Chateau Laurier, in Ottawa, Canada, on the subject "Our Heritage."

On a March date not yet fixed, he will address a dinner of the Delaware State Bar Association, at Wilmington, Delaware. He will attend the annual meeting of the Florida State Bar Association, in Miami, Florida, and Havana, Cuba.

### *To Greet New Members Attending Boston Meeting*

ON Sunday afternoon, August 23rd, the day before the opening of the American Bar Association Convention, the President and Mrs. Ransom will be informally "at home," at the Hotel Statler, Boston, to greet and welcome the new members of the Association and those members who are attending a convention of the Association for the first time.

Cards for the reception will be sent to those who have joined the Association since July 1, 1935, and to those members who make hotel reservations for the Boston Convention but have not registered for any previous convention of the Association.

The reception will give the newcomers an opportunity to meet and become acquainted with the officers, members of the Executive Committee, General Council, Section Chairmen, Committee Chairmen, and others of the "official family" of the Association, before the opening of the convention on Monday morning. The usual reception for all members of the Association will take place Monday evening, and will be followed with dancing.

### *Committee on Unauthorized Practice of Law Holds Two-Day Meeting*

THE American Bar Association's Committee on Unauthorized Practice of the Law held a two-day meeting at Chicago, Illinois, February 1st and 2nd, 1936.

The Committee's docket was very heavy and called for the consideration of a large number and wide variety of unauthorized practice questions. It took action upon a number of important matters.

After a conference with Herbert U. Nelson, executive secretary of the National Association of Real Estate



From our Gallery of Association Chairmen: Left, JAMES G. MCGOWEN, Chairman Special Committee to Study Federal Legislation and Policies as Affecting the Rights and Liberties of American Citizens; Right, GEORGE R. GRANT, Chairman Public Utility Law Section.

Boards, it prepared and announced the following opinion:

"It is the opinion of the Committee on Unauthorized Practice of the Law of the American Bar Association that it is not against public interest or contrary to public welfare for one not licensed to practice law, to appropriately fill in the blanks of a legal instrument which, within a reasonable time of its use, has been selected, or prepared, specifically for that particular use by one licensed to practice law who has also instructed such a user of the instrument fully regarding the essential details requisite to execution and creation of a valid, legally operative, instrument and regarding any further act of filing, recordation, or similar step, prerequisite to protection of the parties and their rights.

"Except as above stated, it is, in the Committee's opinion, not in the public interest for one not licensed to practice law to select, to adopt, to adapt, to draft, or to otherwise prepare or shape, a legal instrument for use for a particular purpose, or under particular circumstances or conditions, or in a transaction or dealing, or as appropriate to the accomplishment of specific objectives.

"This is equally true whether the occasion for giving the advice, or rendering the service, or preparing the instrument may seem to concern something simple, or that it seems to be done without compensation, or that it seems to be incidental or ancillary to the actor's business, trade or profession.

"Particularly, does the Committee consider it contrary to public welfare and substantially to the public injury for one not licensed to practice law and who has an interest adverse to, or in conflict with, that of the parties to a transaction, or either of them, and to the instrument evidencing it, (or an interest which may be, or become, so), to select, adopt, adapt, draft, shape or otherwise prepare such an instrument.

"These principles, in the Committee's judgment, apply to a real estate dealer, real estate agent, real estate broker, or similar representative and intermediary, who, when his compensation depends upon the successful closing and conclusion of the transaction, gives legal advice, renders legal services, or selects, adopts, adapts, drafts, shapes or prepares, the legal instrument used to consummate and evidence the deal. The interests of one whose compensation so depends are necessarily and inevitably opposed to those of the parties. His interests will be favored, promoted and assured as against theirs, if neither of the parties he is bringing together in the transaction obtains independent counsel or advice or makes, or causes to



**Key Man**  
From our Gallery of Association Chairmen: Left, JAMES A. SIMPSON, who succeeds the late William D. Guthrie as Chairman of Committee to Oppose Ratification by States of Federal Child Labor Amendment and Promote Adoption of Uniform Child Labor Act; Right, NEWTON D. BAKER, Chairman of Committee on Cooperation Between Press, Radio and Bar, Against Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings.



be competently made, a thorough, independent inquiry into (a) the state and condition of the title, of existing incumbrances, and other matters substantially affecting their rights and interests; or (b) as to the suitability of the instrument and its provisions to actually contain and state the parties' agreement; or (c) as to any other of numerous matters inquiry into, or investigation of which, may delay, substantially change, or even prevent, the deal entirely.

"Such conduct is particularly reprehensible if the parties are urged, or caused, not to make such independent inquiry, or not to take such independent counsel on the representation that it is unnecessary; that expense, time and inconvenience can be saved by not taking it; that the realtor is more competent to attend to it than any one else, and like statements."

It considered the amendments to Rule 8A of the United States District Courts for the eastern and southern districts of New York regarding solicitation of claims in bankruptcy and the similar rule adopted several years ago by the United States Court for the District of Minnesota, and decided to urge the general adoption of the rules by all other district courts in bankruptcy. The rules in full appear in the February, 1936, Unauthorized Practice News.

The Committee also considered the resolution adopted by the New York State Bar Association at its meeting in January, 1936, directing the New York Association's officers and committees to oppose the enactment of the law pend-

ing before the New York legislature licensing and regulating collection agencies, and decided to urge as a general policy the opposition to the enactment of the same or similar laws wherever proposed.

In view of the pendency in Missouri of a case against The Corporation Trust Company alleging that that company is engaged in the unauthorized practice of law in rendering services exclusively to lawyers, it decided to neither consider nor express any opinion regarding the unauthorized character of acts of corporate organizers when the services are rendered exclusively to lawyers. It did, however, conclude that such services are unquestionably unauthorized practice of the law if rendered to laymen.

The general subject of foreign lawyers, and particularly such lawyers as practice in this country the law of a foreign country, was considered. The Committee decided to urge the amendment by our several states of their general statutes authorizing the licensing of lawyers to practice so that a limited license may be issued to such foreign lawyers as can establish their character and qualifications for the practice of the law of a particular foreign country.

The Committee gave especial consideration to the topics of practice of law by realtors and title companies; by accountants, auditors and the like; by corporate organizers; by laymen in justice of the peace, city, magistrates and other inferior courts.

It was decided to revise and republish the Handbook on Unauthorized

Practice of the Law and, if possible, before the Association meets in Boston, in August.

Much consideration was given to several actions pending and a hearing about to be had before the Commissioner of Insurance in Illinois, which involve the question whether an insurance company which defends an insured under a policy providing for such defense, and providing that the insurer shall pay any judgment rendered against the insured in such an action, is engaged in the practice of the law. The Committee decided to adhere to the position it took at its May, 1935, meeting, namely, that action seeking to have such insurers declared to be engaging in unauthorized practice of the law should be discouraged.

In response to a request that the Committee prepare a statute which may be generally urged for enactment defining and generally prohibiting the unauthorized practice of the law, the Committee, after thorough consideration, decided not to change the policy heretofore decided, and expressed by it in its several annual reports; and to decline to prepare such a statute.

Considerable discussion was had, and consideration given, to the advisability of litigating unauthorized practice of the law principles in litigation between private parties, and of the desirability of submitting unauthorized practice cases upon stipulations of fact. While the Committee realized that the circumstances and conditions might, in a particular case, make such action desirable, nevertheless, it was its opinion that the determination of whether particular acts constitute the unauthorized prac-

tice of law can ordinarily be more satisfactorily and effectively determined in a proceeding raising the issues directly than in a civil proceeding between private parties. The Committee also feels that, oftentimes, the opportunity to show the real injury to the public of the particular unauthorized act complained of and the serious effect thereof upon the administration of justice is lost where stipulations are used instead of having a plenary trial where the "live" evidence is presented to the court.

The Committee requested opinions from the Association's Committee on Professional Ethics and Grievances regarding the propriety of the conduct of a lawyer who acts as attorney for a collection agency assignee of claims for collection; and of an attorney accepting employment for a trade association where the association collectively represents its members in tax, freight rate, legislation and other matters in which the members are collectively interested in substantially the same manner and to substantially the same extent, but in which the association, as an entity, is not directly interested.

Mr. Charles Leviton, a member of the Committee's Associate and Advisory Committee, attended and participated in the meetings. Mr. H. O. Edmonds, Chairman of the Bankers Association, Trust Company Division, Committee on Relations with the Bar, also attended the meeting and reviewed with the Committee the general situation as it affects lawyers and corporate fiduciaries.

The next meeting of the Committee will be held at Washington, D. C., beginning May 4, 1936.

## Preliminary Report on Judicial Salaries

A RECENT survey by the Association's Special Committee on Judicial Salaries, concerning salaries paid to State Judges, has disclosed interesting facts.

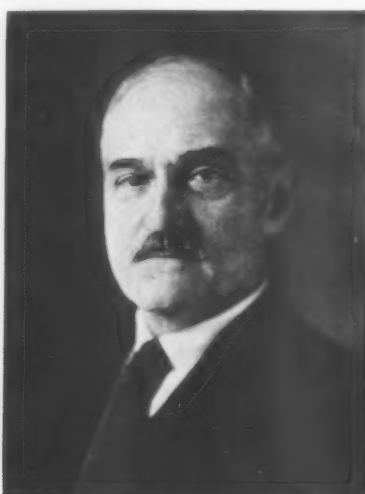
No complete compilation of judicial salaries has been made since the depression; and the Committee felt it necessary to bring the available records up to date, in order to have a proper starting point. A questionnaire was, therefore, sent to each jurisdiction represented on the General Council of the Association.

Prior to the depression, the predecessors of this Committee had been able to annually report a general tendency to increase judicial salaries. The recent survey shows that since 1929 only two States have granted increases. Quite contrary to the previous trend, eleven States have made statutory salary reductions since 1929, ranging from 10% to 33⅓%. An attempted reduction of 40% was held invalid. In two States salary reductions will take effect as new Judges assume their duties.

Probably the most conspicuous fact developed by the survey was that, without statutory action, there had been a wide-spread decrease in judicial salaries because public sentiment had persuaded Judges to voluntarily forego portions of their regular compensation. This situation applies in nineteen States. In twelve of these, the reduction was 10%; in six, 15%; and in one, 25%.

It was gratifying to find that in eleven States, reductions made during the depression have been restored, and that no State expects further legislative attempts to reduce judicial salaries or curtail expense allowances.

The object of this preliminary report is to suggest to States and districts, especially those where so-called voluntary reductions are in effect, that conditions may now be such as to justify a discontinuance of such reductions. This Committee feels that it is not for the American Bar Association to attempt to pass upon the sufficiency of judicial salaries for State Courts; but it does believe the above information should be generally disseminated, in order that members may be fully informed as to the embarrassing position in which many Judges find themselves by reason of enforced reduction in salaries already none too large. It appears from the compilation that in many instances lawyers who were otherwise well informed were not aware of the fact that the agitation for economy had in fact forced the Judges into a position of surrendering part of their salaries. The



From our Gallery of Association Chairmen: Left, **FREDERIC R. COUDERC**, Chairman of Committee to Consider Affiliation with Union Internationale Des Avocats; Right, **HENRY UPSON SIMS**, Chairman of Committee to Further the Acquisition of Portraits of Former Associate Justices of the Supreme Court of the United States from the Founding of the Court.

solution of such a situation is a matter for State and local action.

WALTER S. FOSTER, Chairman,  
Committee on Judicial Salaries.

### Thirty Nations Nominate Hudson for World Court Bench

THE latest news from Geneva indicates that Manley O. Hudson of the Harvard Law School has been nominated by some thirty nations to succeed Frank B. Kellogg on the World Court bench. A partial list of these is as follows: China, Colombia, Cuba, Estonia, Finland, Haiti, Hungary, Japan, Netherlands, Siam, Switzerland, the United States, Norway, Czechoslovakia, Poland, Great Britain, France, Italy, Irish Free State, Austria, Belgium, Yugoslavia, and Iraq. Hitherto, nomination by the American group in the Permanent Court of Arbitration has been equivalent to election, the Assembly and the Council always following this lead. With the large group of other nations falling in line it seems likely that this will again be the case. The elections will be in September unless a special session of the Assembly is called before that time.

Mr. Hudson is Bemis Professor of International Law at Harvard Law School and a member of the Permanent Court of Arbitration. He has spent his summers in the Secretariat of the League of Nations in Geneva since its beginning and is regarded, according to the New York Times, as probably the world's leading authority on everything pertaining to the World Court.

Professor Hudson has been a Commissioner on Uniform State Laws, a member of the Paris Peace Conference in 1919, special assistant of the American Embassy at Paris, member of the legal section of the Secretariat of the League of Nations, and legal adviser to several international labor conferences. He was editor of the Missouri Law Bulletin, the American Journal of International Law and has published numerous books and articles on international topics. His work, "International Legislation" is regarded as a unique compilation of multi-lateral treaties of the post-war period. His latest book, "By Pacific Means," was published in November, 1935.

### Dean Pound Takes Committee Chairmanship

BECAUSE of his professional work, Ex-Senator Arthur L. Scott of Nevada has resigned as Chairman of the Association's Special Committee on Un-



From Our Gallery of Association Chairmen: ROSCOE POUND, who succeeds A. L. SCOTT as Chairman of the Committee to Consider and Report as to Duplication of Legal Publications.

necessary Duplication of Law Books and Legal Publications. The President of the Association has appointed Dean Roscoe Pound of the Harvard Law School as Chairman of the Committee, and William R. Roalfe of the Duke University Law Library, Durham, North Carolina, as a member to fill the vacancy caused by Dean Pound's elevation to the Chairmanship.

Mr. Roalfe is the president of the American Association of Law Libraries, which in 1936 holds its annual convention in conjunction with the meeting of the American Bar Association. The Association of Law Libraries will convene in Boston on August 20th, and has also appointed this year a committee to see what can practically be done to reduce the unnecessary volume of law books and publications.

### Former Senator Pepper Elected President of American Law Institute

HON. GEORGE WHARTON PEPPER has been elected to succeed the late George W. Wickersham as President of the American Law Institute. The action was taken at the mid-winter meeting of the Council held in New York City in February. At the same session Judge Augustus Hand, of the Federal Circuit Court of Appeals was made a member of the Council, which is the governing body of the American Law Institute. Judge Learned Hand of the Federal Circuit Court of

Appeals and Mr. Charles McHenry Howard of the Baltimore Bar were elected first and second Vice Presidents, respectively.

Mr. Pepper is a graduate both of the College and the Law School of the University of Pennsylvania. Throughout his life he has taken an active interest in the affairs of that Institution. In 1893, four years after receiving his law degree, he was elected to the Biddle professorship of law in the University of Pennsylvania, remaining in this position for seventeen years. He was appointed Lyman Beecher lecturer at Yale for the year 1915.

Since 1890 Mr. Pepper has engaged in the active practice of law as a member of the Philadelphia Bar. In January, 1922, he was appointed United States Senator from Pennsylvania to fill the vacancy caused by the death of Boies Penrose. The following November he was elected to the United States Senate, on the Republican platform, for the full term ending in 1927. In the Senate Mr. Pepper held important committee assignments. He was a member of the committees on foreign relations, on naval affairs, on banking and currency and law revision. From the foreign relations committee he submitted to the Senate a plan by which he sought United States membership in the World Court without adherence to the League of Nations. He is the author of "The Borderland of Federal and State Decisions" (1889); "Pleading at Common Law and Under the Codes" (1891); "The Way" (1909); "A Voice from the Crowd" (1915); "Men and Issues" (1924); "In the Senate" (1930) and "Family Quarrels" (1931). With William Draper Lewis he edited a "Digest



PHILLIP HINDEN  
HON. GEORGE WHARTON PEPPER

of the Laws of Pennsylvania" and a "Digest of Decisions and Encyclopedia of Pennsylvania Law."

He is a trustee of the University of Pennsylvania, fellow of the American Academy of Arts and Sciences, and a member of the American Philosophical Society, the University and Racquet Clubs of Philadelphia, and the Cavendish and Universities Clubs of London.

Mr. Pepper holds the honorary degrees of LL.D. of the University of Pennsylvania (1907), Yale (1914), Pittsburgh (1921), Lafayette, University of Rochester and Pennsylvania Military Institute (1922) and Kenyon College (1924) and the D.C.L. of the University of the South (1908) and of Trinity College (1918).

## Washington Letter

### Restricted Extensions for Filing Tax Returns

THE following statement has just been issued by the Bureau of Internal Revenue:

"Complaints have reached the Bureau to the effect that the Collectors of Internal Revenue were refusing to grant extensions of time for the filing of income tax returns and advice has been requested as to whether the Bureau of Internal Revenue had issued mandatory instructions to Collectors that requests for the extension of time should be generally denied.

"It is not desired that Collectors take an extreme position and deny taxpayers extension of time for filing returns in all cases. However, during recent years there has been an ever increasing

number of requests for extensions of time for the filing of income tax returns. Not only has the number of taxpayers requesting this privilege increased but the amount of time asked for has increased to a point where the orderly handling of the returns has been impaired. Investigation has disclosed that in many instances no substantial necessity existed for the extension requested and granted.

"Because of the abuse of this privilege it has become necessary to require taxpayers to support their requests for extension of time with evidence showing good cause for the delay.

"As the authority to grant extensions of time for filing income tax returns has been delegated to the Collectors of Internal Revenue, it is necessary that the taxpayer address his request to the Collector for the district in which he files his return. Instructions have been issued to collectors that the abuse of the extension privilege must be stopped and that extensions should be granted only in those cases where sufficient cause exists to justify the delay.

"A mere inconvenience to the taxpayer will not be considered sufficient justification to warrant such an extension."

### States' Rights, Interstate

May one state prohibit within itself the sale of prison-made goods when those goods happen to have been made in another state? May the Federal government, by legislation so providing, divest interstate shipments of prison-made goods of their interstate character and render them subject to the laws of the state of destination?

These questions may be answered when the Supreme Court decides a case

recently argued before it, namely that of *Whitfield v. State of Ohio*. *Whitfield*, as an agent of the State of Alabama, was selling in Ohio men's work shirts manufactured in a prison in Alabama. Ohio had a statute which prohibited the sale of prison-made goods in the open market. The defendant's contention was that the Hawes-Cooper Act constituted an improper exercise by Congress of its constitutional power, "to regulate commerce . . . among the several States," in two respects:

1. That the act in question was an unlawful delegation, by Congress, to the States of its function of regulating interstate shipments; and

2. That no authority existed in Congress to permit a State to prohibit the sale of goods received in interstate commerce which are not inherently "harmful, injurious or deleterious."

The federal statute under interpretation is the one which provides that five years after January 19, 1929 all prison-made goods transported in another state should be subject to the laws of that state "to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise." U. S. C. A. Title 49, Sec. 60.

This act was held constitutional by the Court of Appeals in Ohio and petition in error to review that judgment was dismissed by the Supreme Court of Ohio. 196 N. E. 164; 197 N. E. 605. Another State court has held this statute to be a valid exercise of the commerce power. *State v. Whitfield* (1934) 216 Wis. 577, 257 N. W. 601. This recalls the case attempted by the State of Alabama against nineteen other states seeking, by an original proceeding in the Supreme Court, to enjoin their enforcement of statutes against convict-made goods; leave to file which proceeding was denied. *Alabama v. Arizona, et al.* 291 U. S. 286.

The Attorney General of Ohio, in support of the Hawes-Cooper Act, contends:

1. That it is a regulation and not an attempt by Congress to delegate its powers to the States;

2. That, in exercising the power to regulate interstate commerce, the acts of Congress properly may amount to a prohibition; and

3. That the act's constitutionality has been settled in principle by *Wilkerson v. Rahrer*, 140 U. S. 545 dealing with similar provisions in respect to intoxicating liquor.

In reply, *Whitfield's* attorney insists that "the Hawes-Cooper Act proposes



From our Gallery of Association Chairmen: Left, HON. JESSE C. ADKINS, Chairman Judicial Section; Right, THOMAS J. MICHIE, JR., Chairman, Mineral Law Section.

to change the basis on which the Wilson Act was declared valid" in the Wilkerson case; and that the police power of the State may not be used to secure commercial advantages.

The answer of Ohio is that its law was passed to protect free labor from the competition of prison labor; and that it is a reasonable regulation designed to promote the public welfare.

#### Return to Private Employment

Desiring to protect employers who are paying standard and going rates of wages and that the W. P. A. organization shall not be used as a means of forcing workers to accept sub-standard wages, the Works Progress Administration has stated the conditions under which persons on its projects will be required to take private employment:

"It is expected that W. P. A. workers will accept available jobs in private employment, whether of a permanent or temporary nature, provided: (1) that the temporary or permanent work shall be a full-time job; (2) that such work shall be at a standard or going rate of wages; (3) that such work shall not be in conflict with established union relationships; (4) that workers shall be offered an opportunity to return to the W. P. A. upon completion of temporary jobs."

#### Door-to-Door Freight Service Encouraged by I. C. C. Ruling

The Interstate Commerce Commission has refused to suspend tariff schedules proposed by railroads for pick-up and delivery service of less than carload traffic. The decision was reached by a 6 to 4 division, the three members constituting the Motor Carriers Division being numbered with the minority of 4. The action of the Commission affects immediately an area equal to approximately one-third of the United States.

This authorization permits the railroads to accept c. o. d. consignments and also to make an allowance to shippers and consignees of 5 cents per 100 pounds if the latter elect to perform the pick-up themselves. One railroad company has announced that it will begin April 1st a complete door-to-door service for less than carload freight between all points on its system at no additional cost.

#### Citizenship—Repatriation; Commutation

Extension backward of the Married Women's Citizenship Act (8 U. S. C. A. Sec. 9) will be effected if S. 2912 becomes law. This bill passed the Senate February 4, 1936 and has been referred to the Committee on Immigration and Naturalization of the House. Therein it is provided that a woman, a native born citizen, who has lost her

United States citizenship by reason of marriage to an alien, prior to September 22, 1922, and whose marital relation with such alien has or shall have been terminated, would be deemed to be a citizen as though her marriage had taken place after September 22, 1922, the date of enactment of the former law.

The woman thus repatriating would be required to take an oath of allegiance to the United States before a court of record, a secretary of embassy or legation, or a consular officer. Records of such oaths would be kept and certified copies made available at a fee of one dollar.

Another border-line question may be settled if H. R. 4340 is enacted. This bill passed the House February 3, 1936 and was referred to the Senate Committee on Immigration. It would deny, to aliens from countries whose boundaries touch the United States, the right to cross the international boundary habitually for the purpose of seeking employment or engaging in any employment in the United States entailing the passing to and from a residence outside continental United States.

Such persons would be held to be immigrants and would be excluded or deported unless in possession of an unexpired immigration visa at each application for admission or unless they have a re-entry permit. The Act would not apply to employees of a common carrier operating between points in the United States and contiguous foreign territory.

#### Oliver Wendell Holmes Memorial Fund

Resolutions favoring the enactment of House Joint Resolution No. 237 have

been received by the Senate from both the New York County Lawyers' Association and the New York State Bar Association. This Joint Resolution was passed by the House last June and was then reported in the Senate by the Judiciary Committee (Report No. 931). It proposes to credit the amount which the United States Government will receive as residuary legatee of the late Justice Holmes to the Library of Congress Trust Fund Board as a special fund to be known as the Oliver Wendell Holmes memorial fund, the income thereof to be used for the purpose of building up and maintaining a collection of legal literature in the law division of the Library of Congress.

#### Declaration and Constitution Available in Committee Pamphlet

THE Committee on American Citizenship of the American Bar Association has republished a pamphlet containing the full texts of the Declaration of Independence and the Constitution of the United States. In addition to these documents certain introductory and explanatory material is included in this vest-pocket-sized booklet, which is available at the headquarters office of the American Bar Association. Single copies will be sent free to all members of the association. To all others the cost is ten cents a copy. This edition of these great papers of State grew out of the recognition of the need for the widespread availability of these documents in convenient form. The demand for the republication of the booklet from time to time has been extensive.



Matzow  
From our Gallery of Association Chairmen: Left, HERBERT A. FRIEDLICH, Chairman of Committee on Amendments to Federal Securities Act; Right, WILLIAM S. CULBERTSON, Chairman of Committee on Facilities of the Law Library of Congress.

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# "ABRAHAM LINCOLN . . PROFESSION A LAWYER"

By HON. WILLIAM L. RANSOM  
*President of the American Bar Association\**

**B**Y your request, I am to speak of Abraham Lincoln. It is fitting that, at your February meeting each year, the name and example of such a lawyer should be extolled, here in the region from which he came, here within sight of the scene of some of his great contests. You are of course aware, as am I, that I can say nothing new about him and can add no lustre to his name. Great heritages and traditions are kept alive by repetition, which serves such a purpose better than would any straining for novelty or variety. Otherwise I would not have been so vain as to try to do what you asked.

Year by year, the enlightened opinion of the world enshrines Abraham Lincoln in a nobler place in the hearts of mankind. His life presents many facets and some sharp contrasts, most of which endear him deeply to men and women everywhere. The voices of strife and criticism have been stilled; the wounds and sorrows left by the War between the States no longer cut so deep; the kindness and common sense of a great soul looms larger with the years.

We turn continually to his life, his course of action, and his words, for all manner of inspiration, confirmations, and guidance. We search the lives and the words of many public men in vain for pronouncements which have universal and ultimate application; but when we study the career of this many-sided lawyer from your plains, we find his utterances to be pervaded with great principles which resound as if spoken for our own times. The fresh inspirations which spring from his example, the continuing guidance which is gleaned from his precepts, the changes in emphasis which may be noted in these memorials from year to year as National conditions change, are in themselves the new tributes to his genius and to his continuing contribution to American life.

## The Profession of Law

My theme tonight is taken from the "tabloid" of autobiography which he put down for Larman's Dictionary of Congress:

"Born February 12, 1809, in Hardin County, Kentucky.

Education, defective.

Profession, a lawyer \* \* \*"

He did not say "occupation" or "business" or means of livelihood. He who used words with precision and presented whole paragraphs of thought in a word or phrase, did not casually say "profession, a lawyer." By his own description before he was forty years old, as well as by his own hard struggles, Mr. Lincoln identified himself with the law as a *profession*. It is also significant, to me, that at the close of his life, the men who knew him best, here in the Courts of Illinois, spoke of him, not merely as a lawyer who had won individual success and acclaim at the Bar, but as a lawyer who had been faithful to the highest traditions

of a noble profession. Nearly thirty years before Bar Associations started on their slow and difficult task of making American lawyers a profession and the law of this land a science, Mr. Lincoln was a lawyer—by profession.

As a young lawyer, virtually a managing clerk in an office which needed income, he wrote to a client:

"As to the real estate, we cannot attend to it. We are not real estate agents. We are lawyers. We recommend that you give the charge of it to Mr. Isaac S. Britton, a trustworthy man and one whom the Lord made on purpose for such business."

He was ever at war with those lawyers who stirred up litigation and strife, for their own gain. He said, in language apt today:

"A moral tone ought to be infused into the profession which should drive such men out of it."

## Leader of the Bar of His State

I shall not venture to review in detail the career of Mr. Lincoln as a lawyer, the active life he led in the trial of cases, or the notable causes in which he appeared before the Supreme Court of his State and of the United States. The chronicles of his career at the Bar are a priceless part of the heritage of every American lawyer, and are at least as well known to you as to me.

Beyond any doubt, from the evidence, this man who had been a migrant store clerk, captain of militia, storekeeper, postmaster, member of the Illinois legislature for four terms, member of the National House of Representatives for one term, and unsuccessful applicant for political appointment to the commissionership of the Land Office, had become a practicing lawyer of the first rank; and at the time of his elevation to the presidency, he was virtually the leader, and certainly the foremost jury lawyer, of the Bar of the State of Illinois, which then as now was noted for the number of its fine lawyers.

There may be baffling contrasts between the young roustabout of Gentryville and New Salem and the mature and mystical orator of the Gettysburg Address and the First and Second Inaugurals; but the Lincoln who served and saved the Nation as Chief Executive, was a consistent revelation of the Lincoln who had led the Bar of his State and had used his great skill as a lawyer in drawing and defining the issues of his debates with Senator Douglas. As president, he showed the trained lawyer's aptitude and capacity for accomplishing the tasks to which he was committed by his oath. "On that sure-footed mind's unfaltering skill," he dramatized and personified the demand of a bewildered, stricken Nation for clear and inspired leadership.

## Contemporary Judgment of Mr. Lincoln as a Lawyer

From experience, I have come to value, and usually to accept, the contemporary judgment expressed concerning lawyers, by men who knew and saw their professional work and were in the best position to form opinion of its quality and effectiveness. Especially is this process of appraisal necessary as to a public character such as Abraham Lincoln, who went

\*The Lincoln Memorial Address by William L. Ransom, President of the American Bar Association, at the Annual Dinner of The Peoria Bar Association to the Justices of the Supreme Court of Illinois and the officers, Governors, and Sections of the Illinois State Bar Association, at the Pere Marquette Hotel, Peoria, Illinois, on February 15, 1936.

from the court-rooms of this country to become an almost legendary figure in the opinion and affection of mankind. For the great majority of men, the Lincoln who was the rugged, active leader of the Bar of a great State has been obscured by the Lincoln who "sank so deeply into the hearts of the people of many lands."<sup>1</sup>

So I bring back to your minds tonight the scene when, on March 3, 1865, the Supreme Court of Illinois convened in the Court-room at Ottawa, to pay tribute to the memory of the lawyer who would never come back to his place before that tribunal. The full bench was present,<sup>2</sup> and the testimony was that of men who had been his associates and his adversaries, and had known intimately the life and work of Mr. Lincoln as a lawyer.

The former Chief Justice of the Court, Mr. J. D. Caton, spoke for the Bar; and we as lawyers are entitled to note carefully his words and their full significance:

"... For nearly thirty years Mr. Lincoln was a member of this Bar. But few of us are left who preceded him. From a very early period he assumed a high position in his profession. Without the advantage of that mental culture which is afforded by a classical education, *he learned the law as a science.*"

Again:

"His great reputation for integrity was well deserved. The most punctilious honor ever marked his professional and private life. He seemed entirely ignorant of the art of deception or of dissimulation. . . . I venture the assertion that no one ever accused him of taking an underhanded or unfair advantage in the whole course of his professional career."

Mr. Justice Sidney Breeze spoke for the Court:

"... It becomes us to speak of him only as a man and as a lawyer—as a member of an honorable profession from whose ranks have been taken in times of the greatest emergency men whose high destiny it has been not only to guide the car of victory, but to sustain the weight of Empire. . . . He was, therefore, a successful lawyer, but wore with great humility the distinction he had won. For my single self I have for a quarter of a century regarded Mr. Lincoln as the fairest lawyer I ever knew, and of a professional bearing so high-toned and honorable as justly and without derogating from the claims of others, entitling him to be presented to the profession as a model well worthy of the closest imitation."

These contemporary estimates should prevail. Abraham Lincoln was distinctively an American lawyer of first rank, who thought of himself, as others did, as a member of a profession devoted to "the law as a science." He attained professional distinction without leaving the ranks of those who will always be the great reservoir of strength and stability for our country and our profession—the country lawyer.

#### One of Mr. Lincoln's Professional Cards

In a far corner of the Lincoln exhibit in the old Ford Theatre in Washington, a show-case contains one of Mr. Lincoln's professional cards. A member of the American Bar Association<sup>3</sup> sent me a copy of this card. To some of you, it may be a familiar part your Lincoln collections; but I read it here because it reflects the humor and human outlook of a modest lawyer whose life and practice were cross-sections of his community:

"Abraham Lincoln  
Attorney and Counsellor-at-Law  
Springfield, Ill.

To Whom It may concern

My old customers and others are no doubt aware of the terrible time I have had in crossing the stream, and will be glad to know that I will be back on the same side from which I started on or before the 4th of March next, when I will be ready to swap horses, dispense law, make jokes, split rails, and perform other matters in a small way."

The fourth of March referred to on the card was evidently March 4, 1849, at the end of his term in Congress, when he came back to his professional work in this Circuit, with his political career ended, so far as could be foretold, and with a great deal of disillusionment in his soul.

Eleven years later, as leader of the Bar of his State and "idol of the Eighth Circuit," despite a conspicuous defeat for election to the Senate of the United States, the author of this professional card was nominated for the presidency, under circumstances which assured election. How fortunate that in those days there were no ascendant voices to counsel the Chicago convention of his party that it would not do to nominate a railroad company lawyer who had been defeated for the Senate in his own State two years before!

#### Mr. Lincoln's Adherence to Enduring Principles

No ordinary notions of political availability could dim the star of destiny for this Illinois lawyer. Absorption in the work of his profession left him always alert and ready to give and do his best, in behalf of the right as he saw it. He never claimed exemption from what he called "the drudgery of the law," but he always had time to devote to great causes, beyond the day's work. His mind attached itself and adhered to what he believed to be great principles and causes but never to theories, and his courage and skill joined in creating the issues for which he became the logical leader.

Owing to the conditions of his time, he dealt almost wholly with the ever-changing aspects of a single National issue. The complex economic and social problems of the twentieth century had cast no shadows upon his generation, and he did not foresee them. He had none of the mood or jargon of neo-realism. To many today, his economic philosophy and social outlook, if studied, would appear very narrow and old-fashioned. From young manhood to death, he was concerned with essentially one issue which dwarfed all others. Yet when we read his addresses today, we find much in their spirit and outlook which might well be chart and compass for the statesmanship and the public opinion of a very different era.

It has become very much the fashion nowadays to ransack the writings of the public men of earlier American history, in an effort to find sentences or analogies which can be torn from context and used to demonstrate the supposed wisdom of particular policies or points of view in the present tense. Such a resort to quotation rather than reason produces often some incongruous results, and there is much to be said for the point of view that the utterances of one generation may not be entitled to control the action of later generations; because of the marked differences in conditions. Oftentimes it is altogether clear that the statesman quoted would have held different views if he had lived to see the changed conditions subsequently arising; and oftentimes the gentleman quoted did ex-

1. David Lloyd George.

2. 37 Ill. Sup. Ct. Repts., page 1.

3. Mr. Charles A. Sunderlin, of Los Angeles, California.



The Old Peoria County Court House, at Scene of One of the Memorable Debates between Lincoln and Douglas. It was erected in 1855 and torn down in 1876.

press very different generalizations in his own lifetime, when maturity came or when conditions changed.

Nevertheless, when we examine the lofty utterances of Abraham Lincoln, there seems to be an almost universal consent that he spoke, not for his day or generation, but in terms that long will have meaning and significance, wherever liberty and law and constitutional government are maintained. He revealed himself, and his four-square philosophy of government and life. He believed deeply in the Federal Union, the Union of the States, and he was willing to go to extreme measures in order to save our dual system as a Nation. Above all, he championed the right of men to be free, in body and in mind; and the dominant note of his life was advocacy of the right of each individual to life, liberty and the pursuit of happiness in his own way, as against other men and as against the encroachments of government.

We see and hear him in the State convention of his party in 1856, as spokesman for the dauntless spirit of his State:

"In 1824 the free men of our State, led by Governor Coles, determined that these beautiful groves should never re-echo the dirge of one who has no title to himself."

When the Dred Scott decision was rendered, Mr. Lincoln shrewdly summarized it in a single sentence, in the first speech of the great debate:

"If any man choose to enslave another, no third man shall be allowed to object."

That defined an issue upon which there could be but one outcome. As a lawyer of the open country, he fought with all his might against the doctrine that

the denial of the rights and liberties of any of the people is no concern of others, even those whose rights and liberties have not yet been abridged. He saw clearly, and exercised, the right and duty of American lawyers to resist vigorously the denial or the undermining of human rights and liberties, whether undertaken in the guise of maintaining supposed rights of property or in the guise of creating or re-distributing the powers and functions of government.

#### Mr. Lincoln's View of the Constitution and the Courts

A present-day memorial of this great lawyer will appropriately include comment upon his view of the American system of government, the organic law, the decisions of the Courts concerning it, and the ultimate powers of the people regarding their fundamental law. As I study the utterances of Mr. Lincoln and try to place them in the background of his time, I conclude that he was an enlightened and far-seeing view.

Mr. Lincoln evidently believed that government exists for the people, not the people for government; that government does not create rights or liberties, and should not be permitted to take them away; that the Constitution of the United States grants limited and defined powers to the National government, but reserves and protects those not granted; and that, in the final analysis, the deliberate will of the people rather than any or all of the departments of government, determines the fundamental law. As the people have final say as to the powers of government and the limitations placed upon government, Mr. Lincoln apparently felt

free to discuss outspokenly before the people any matter involving human rights and freedom, no matter what had been the first disposition of it by any of the three departments of government. Above all, he knew that no issue of human liberty and the rights of man "is ever settled, until it is settled right."

We never find him trying to settle or advance such an issue by having one department of government usurp the powers of any other branch, or by having the legislative and executive branches of government combine to weaken or take away the powers of the judicial branch of government; but he looked upon the decisions of the Courts, in cases involving governmental powers and human rights, as proper subjects of discussion before the people, by lawyers and other citizens. Whether he would have felt that members of the executive and legislative branches of government should as freely challenge the decisions of the Courts, I do not know.

Concerning the Dred Scott decision, when Senator Douglas claimed that his opponent was fomenting revolution, Mr. Lincoln as an American lawyer replied:

"We believe as much as Judge Douglas (perhaps more) in obedience to and respect for the judicial department of government. But we think the Dred Scott decision is erroneous. We know the Court that made it has often overruled its own decisions and we shall do what we can to have it overrule this. We offer no resistance to it."

The redress for erroneous decision he saw to be in first instance before the Court, but always in free and full discussion before the people.

#### "With Malice Toward None"

As the lawyers and people of America come evidently to the eve of another great debate, no less important than that in which Mr. Lincoln was the central figure, we all may do well to note and heed the mood and spirit of this man. Throughout his life and particularly in the presidency, this great lawyer showed a broad and tolerant respect for the rights, the opinions and the motives, of others. Despite what Emerson described as "the hurricane in which he was called to the helm," Abraham Lincoln sounded no appeals to classes or minorities, and sought to unite rather than estrange his countrymen. He saw only the whole people of his country, and he acted and spoke "with malice toward none." He did not say "with malice toward some" or ascribe malice or selfish motives to those who disagreed with him; his outlook was rather that of George Washington, who said, in his Sixth Annual Address to the Congress, in 1794:

*"To every description of citizens, indeed, let praise be given. But let them persevere in their affectionate vigilance over that precious depository of human happiness, the Constitution of the United States."*

It is no wonder that these two broad, tolerant men, who respected the opinions and motives of other people because they knew the integrity and rectitude of their own motives and opinions, are the most beloved, and the most universally admired, leaders in all our history!

Mr. Lincoln did not pray, at Gettysburg, that "government of the people, by this or that minority, for this or that class, shall not perish from the earth." He did not seek to divide the people or array class against class or section against section; he saw clearly that a Nation cannot exist, half regimented and half free, half ascendant and half dependent; he knew that "a house divided against itself cannot stand." He said simply:

"I have faith in the people. Let them know the truth and the country is safe."

He never sought to inculcate hatred, suspicion or distrust of motives, on the part of some men toward other men. "I have not willingly planted a thorn in any man's bosom," was a recurring phrase; and near the end of his life, he declared that

"Die when I may, I want it said of me by those who knew me best, that I always plucked a thistle and planted a flower wherever I thought a flower would grow."

#### Liberty the Heritage of Americans

"Avoid a dictatorial style," was the counsel given to George Washington by an uncle. Mr. Lincoln had no style or mode of dictatorship, even in great emergency—"A shepherd of mankind indeed, who loved his charge, but never loved to lead." His whole concept of government was along the lines of ordered liberty under law. He said:

"What constitutes the bulwark of our own liberty and independence? It is not our frowning battlement, our bristling seacoast, our army or our navy.

"These are not our reliance against tyranny. All of these may be turned against us without making us weaker for the struggle.

"Our reliance is in the love of liberty which God has planted in us. Our defense is in the spirit which prizes liberty as the heritage of all men, in all lands, everywhere.

"Destroy this spirit and you have planted the seeds of despotism at your own doors."

#### "The Last, Best Hope of Earth"

Abraham Lincoln's view of the future of his country did not turn backward "to the past's blood-rusted key." He announced:

"I shall adopt new views as fast as they appear to be true views."

"Important principles may and must be inflexible."

"I hope to stand 'firm enough' to not go backward, and yet not go forward fast enough to wreck the country's cause."

Deeply he recognized that the hopes and aspirations of mankind depend upon the preservation of liberty and free government in the United States. "We shall nobly save, or meanly lose," he said, "the last, best hope of earth."

#### The Genius of Common Sense

May I close with an expression of personal view, with which some of you will not agree. It seems to me that today and in the years not far ahead, we shall need to hold fast to the enlightened common sense which shaped the policy of this Illinois lawyer when called to the highest place. I do not refer at all to immediate alignments but to the conflicts probable at times not distant, in saying that in this country queer beliefs, quaint plans, for undermining individual independence and enterprise, are becoming vocal. Redistributions of governmental power are advocated, to enable redistributions of property. Old foundations are being rejected, not because they have become unsafe or unsuitable, but because they have stood so long. Cherished beliefs in proven principles of government are being cast aside, not because of change of convictions, but because it has become the mode to bid them good-bye. Half of the people are being made dependent on government, and the other half are coming to fear rather than to cherish their government. Issues and conflicts begin to appear, between the liberties and independence of the people on one hand and the expanding aggressiveness of government on the other.

With such a testing of our institutions not far distant, and with the keen realization that we, too, "shall nobly save or meanly lose the last, best hope of

earth," we well may pledge new and deep devotion to the example and the precepts of Abraham Lincoln.

"Great captains with their guns and drums,  
Disturb our judgment for the hour;  
But at last silence comes;  
These all are gone, and standing like a tower,  
Our children shall behold his fame . . .  
New birth of our new soil, the first American."

## Liability for Radio Defamation

(From address by Mr. A. L. Ashby, Vice-President and General Attorney for NBC, before the American Economic Society, Dec. 27, in New York City.)

**I**N order to serve the public interest, the broadcaster is anxious to avoid broadcasting defamatory matter. He also wishes to avoid liability from damage suits on this score. There is no Federal statute defining the extent of liability of the broadcaster for radio defamation but the few courts which have treated of the question have held the broadcaster to be liable. In none of those cases was the defamatory statement made by an employee of the broadcasting company but nevertheless the broadcasting company was considered to be a joint tortfeasor.

What is contained in the ordinary commercial program is first reduced to writing. That writing is called a "continuity" and is submitted to the broadcasting station in advance of the broadcast. The broadcaster has an opportunity to determine whether it contains any defamatory statement and is, therefore, willing to take the risk of a suit for defamation respecting such continuity. Cases, however, arise in which the broadcaster is liable in damages, notwithstanding he is wholly powerless to prevent the defamation. That situation arises in those instances in which the artist or performer deviates from the manuscript. Before the station is physically able to cut off his statement the damage is done. A similar situation arises where an exuberant fan shrieks out a defamatory statement which is projected into a portable microphone at a football game.

Another peculiar instance of the unfair imposition of liability upon the broadcaster arises with respect to so-called political speeches. Under the law, if a candidate for public office is permitted to broadcast over a station then his opponent must be afforded equal facilities and in neither event is the broadcaster permitted to either edit or modify in any respect the speech of the candidate. Nevertheless, if either of such candidates defames another the broadcasting station is jointly responsible. This is an unhealthy condition and in at least one instance has resulted in one large broadcasting station's refusing to permit any candidate for public office to use its facilities.

The Legal Department of a broadcasting company comes into possession of numerous amusing complaints of listeners who claim that our program material defames either them or others. A gentleman who evidently believed that we were sponsoring a Nazi movement insisted that if we did not clear up our wireless waves and let the time on the air exorbitantly paid for come through in peace and quiet he would sue us in the name of the American people for defamation, extortion, treason and obtaining money under false pretenses. He signed himself "Courteously." Another gentleman ob-

jected to the use of surnames in radio interviews and said that unless we stopped this practice there would be hell to pay. Another person threatened to sue us for "premeditated damages" because we broadcast a Mother's Day program which she considered to be defamatory.

## Arrangements for Annual Meeting at Boston August 24 to 28, inc., 1936

### HEADQUARTERS: STATLER HOTEL

Hotel accommodations, all with bath, are available as follows:

	Single for one person	Double (Dble. bed for two persons)	Twin beds for two persons	Parlor Suites
	\$	\$	\$	\$
Statler .....	3.50 to 8.00	5.00 to 10.00	6.00 to 12	14 to 23
Bellevue .....	3.00 to 5.00	4.50 to 7.00	5.00 to 7	12 to 20
Bradford .....	3.00 to 4.00	4.50 to 5.50	5.00 to 7	12
Brunswick .....	2.50 to 3.50	4.00 to 6.00	4.00 to 6	5 to 10
Copley Plaza ....	4.00 to 6.00	5.50 to 7.50	8.00 to 10	12 & up
Copley Square ....	3.00	4.50	4.50	6
Kenmore .....	3.50 to 4.00	5.00 to 5.50	5.00 to 7	8 to 12
Lenox .....	2.50 to 3.50	4.00 to 5.00	5.00 to 6	5 to 10
Lincolnshire .....	3.00 to 3.50	4.50 to 5.00	5.00 to 6	9 to 11
Manger .....	2.00 to 3.00	3.50 to 4.50	4.50 to 5	
Parker House ....	3.00 to 5.00	4.50 to 6.00	6.00 to 8	10 to 12
Puritan .....	3.00 to 5.00	4.50 to 6.00	5.00 to 6	5 to 10
Ritz-Carlton .....	5.00 to 10.00	6.50 to 10.00	8.00 to 10	12 to 20
Sheraton .....	3.50 to 5.00	4.00 to 5.00	5.00 to 7	7 to 10
Somerset .....	3.00 to 5.00	5.00 to 6.00	5.00 to 8	10 to 12
Touraine .....	3.00 to 5.00	4.50 to 6.00	5.00 to 6	10
Vendome .....	3.00 to 4.00	4.50 to 5.50	6.00 to 7	8 & 9
Westminster .....	2.50 to 3.50	4.00 to 5.00	5.00 to 6	8 to 10

### Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

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To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Ill.

### National Conference of Commissioners on Uniform State Laws

The next Annual Meeting of the Conference will be held at the Statler Hotel, Boston, Mass., beginning Tuesday, August 18, 1936.

Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

# HISTORIC NEW ENGLAND SHRINES OF THE LAW

## II. SALEM, MARBLEHEAD, NEWBURYPORT, ESSEX AND GLOUCESTER\*

By GEORGE R. FARNUM

*Former Assistant Attorney General of the United States*

*He must be indeed an unreasonable creature who, having America for a continent and Massachusetts for a State and Essex for a County is not entirely satisfied.*

JOSEPH H. CHOATE<sup>1</sup>

*The law is my profession; and from the time when, a boy at school, I would crowd into the Court House at Newburyport, to listen to the trial of cases conducted by Saltonstall, Huntington, Choate, Cushing, Moseley, Lord and others, then actively engaged in the practice of law, there has been no occupation to me so attractive, or so congenial to my taste, as that of law. HON. EBEN F. STONE, Address before Essex Bar, February 2, 1889.*

LEAVING behind the land of the Pilgrims with the sand dunes, low lying salt marshes and deep foreshores uncovered by the receding tides, that characterize the shores of Massachusetts Bay south of Boston, and proceeding along the seaboard to the north, the contrast in the topography is of a curious and fascinating interest. After a few miles the curved and sheltered beaches give place, for the most part, to broken and rocky barriers which confront the pounding seas and deeply indented harbors formed by bold promontories with here and there a rocky island and a treacherous reef. One of the latter, Norman's Woe, has been celebrated by Longfellow in *The Wreck of the Hesperus*. Salem, Marblehead, Newburyport, Essex and Gloucester lie along this stretch of coast and, in common with many other old settlements, have retained a large measure of their local color and quaint charm in spite of the changes time has wrought. They contain numerous landmarks of great historic interest, and their annals have for the lawyer, as well as the layman, a peculiar attraction.

This territory is Essex County—one of the four divisions into which the Massachusetts Bay Colony was divided in 1643. Strong was its early pride in political independence. Powerful was the influence in Colonial days of its clergy—so much so that the organization of its social life has not been inappropriately described as a "Puritan theocracy." It was a much governed community, a fact interesting to recall in these days of complaints against our encroaching bureaucracy. Its ancient records show a strongly litigious spirit in the early settlers and their descendants "even

without lawyers to foment a controversy," as a commentator slyly puts it.

One of the county seats—Salem—characterized in a seventeenth century chronicle as "a pleasant and fruitful neck of land," was founded in 1626 and is a place of many and varied memories of bygone days. In 1628 the first judicial body, the General Court—exercising also legislative and executive jurisdiction—was convened here, though two years later it was transferred to Boston. When, a few years later, the first real system of courts was started in Massachusetts, sittings were prescribed at Salem. A much less illustrious tribunal was created in 1692, the notorious special court of Oyer and Terminer, for the purpose of dealing with witchcraft. In the three and a half months of its existence it sent about a score of victims of the terrible hysteria to their doom. It is a curious fact—and one not without some gratification to lawyers—that the Bar was not represented among its members! A gloomy relic of these times still survives in the old Witch House, built on the site of the home of Roger Williams, where the examinations preliminary to trial were conducted. Likewise the old jail, which contains the dungeon where the witches were confined, still stands though well nigh a century and a quarter has passed since it last served as a place of detention. In the Essex Institute, a public museum, is preserved among many historic treasures a report of the examination of Martha Corey, a victim of the tragic delusion, recorded in the handwriting of an inquisitorial clergyman and signed by Judge Hathorne, an ancestor of Nathaniel Hawthorne. Incidentally, nearby the Institute is the house in which Capt. White was murdered. In the subsequent trial of the Knapps, Daniel Webster won enduring laurels as a prosecutor and was assisted by young Rufus Choate. The Court House dates back about a century. It boasts the best State law library and contains among other things of historic interest the oldest collection of Colonial records in the country, which includes the will of Roger Conant, the leader of the first settlers. Incidentally, the apparent lack of adequate support for the main staircase within raises a rather baffling problem in architecture.

Though at one time in the early decades of the Colony the importunate request was made of the English authorities "to send some honest lawyers, if any such there are in nature," in later years the Essex Bar could boast of a fine record. Many have been the great lawyers of the past who at one time or another established their offices in Salem. The roster is too long to call, but it includes Rufus Choate, who practiced here for a number of years before his removal to Boston, as well as Joseph

\*This is the second of a series of articles on Historic New England Shrines of the Law, which are being written by Mr. George R. Farnum, of the Boston Bar. The first article, entitled "Webster and Marshfield," appeared in the February issue of the Journal. Members of the Association will find that they furnish an additional reason for visiting New England and attending one of the most significant meetings in the Association's history.

1. Quotation taken from Fuess—Rufus Choate.

Storey, who was born in nearby Marblehead and who at the age of thirty-two was appointed to the Supreme Court of the United States. In retrospect the fact is not without interest that Storey was able to fill the Dane Professorship of Law at Harvard during the last decade and a half of his life without any apparent detriment to his work on the Court. Timothy Pickering, successively Postmaster General, Secretary of War, and Secretary of State under Washington, was born here in 1745, and in his early days was employed in the local Registry of Deeds and afterwards served here in various judicial capacities. As Colonel of Militia, he participated in what is claimed to be the first armed resistance of the Revolution to British soldiers, when at Old North Bridge they were prevented from crossing and seizing military supplies amassed by the patriots.

Among the literary ghosts that haunt many an old stately Colonial house still standing, that of Hawthorne will take precedence. He was born in Salem on July 4, 1804, in a house on Union Street, built in the seventeenth century and which is still standing. On Turner Street is one of the literary shrines of New England—the famous House of Seven Gables—which he immortalized and which has witnessed the passing of about three

centuries. The Custom House which was constructed in 1818 is described by him in *The Scarlet Letter*. Covering an area of three acres in Forest River Park is *The Pioneers' Village*, presenting a reproduction of life in a Puritan settlement.

Marblehead, though today a great rendezvous of yachtsmen and mecca of summer visitors, has retained—in the main town as distinguished from the aristocratic "Neck"—to an extraordinary degree the impress of a history that goes back to 1629. Along its picturesque waterfront, with its fish piers, sail lofts and boat yards, amid its narrow and tortuous streets and among its fine old Colonial houses, it preserves much of the atmosphere of an early New England seaport. Among its old landmarks that have weathered the years is the birthplace of Elbridge Gerry, signer of the Declaration of Independence, member of the Continental Congress and Vice-President of the United States—and, be it added, with less credit to his memory, the reputed inventor of the political device known as the *Gerrymander*. Marblehead makes the stout claim to be also the birthplace of the American Navy, a pretension based upon the fact that the first American warship to be regularly commissioned was outfitted and manned here. Of more direct interest to law-



OLD COURT HOUSE  
AT NEWBURYPORT,  
CONSTRUCTED  
UNDER BULFINCH  
IN 1805 AND RE-  
MODELED IN ITS  
PRESENT FORM  
IN 1853.



OLD WITCH HOUSE AT SALEM AS  
IT LOOKED BEFORE IT WAS SUB-  
JECTED TO CERTAIN ALTERATIONS.



BIRTHPLACE OF RUFUS CHOATE ON  
HOG ISLAND

yers is the fact that Joseph Story was born here in 1779 in the house on Washington which remains to this day in its original state.

Twelve or fifteen miles along a rugged and storm buffeted coast to the northeast on Cape Ann some English fishermen took up their abode in 1623. In the course of the years that followed this settlement became the greatest salt fishing port in the United States—Gloucester. The spirit of those generations of hardy and intrepid men who went down to the sea in ships has, of recent years, been dramatically symbolized in a bronze monument on the shore of a fisherman in oilskins and sou'wester, braced at the wheel of his vessel and anxiously scanning the open ocean. It was erected in honor of the long roll of those who lost their lives by the perils of the sea. The visitor who is something more than a superficial tourist may doubtless wish to prepare himself by reading Kipling's "Captain Courageous" and James B. Connolly's "Out of Gloucester." During the years, the Admiralty Bar of Massachusetts has drawn many recruits from this and adjoining communities—men familiar with the salty vernacular and technique of navigation, instructed in the law of maritime liens, salvage and general average and initiated in such mysterious business as fishermen's lays. Provincial maritime tribunals go back to 1694 when a Court of Vice Admiralty was set up.

To the north of the Gloucester peninsula a few miles back from the coast on the shores of the Merrimack River is Newburyport, one of the county seats and a town of many legal associations and which dates back to a settlement in 1635. Its early prosperity was largely bound up in fishing, whaling and shipbuilding. Here Caleb Cushing, afterwards Justice of the Supreme Judicial Court of Massachusetts, United States Attorney General under President Pierce and one of the counsel for the United States in the Alabama Arbitration, received his early education and established himself in practice after his admission to the Bar. Theophilus Parsons, a member of the Constitutional Convention and characterized as "Probably the most outstanding barrister in the country in the years between the outbreak of the Revolution and the War of 1812," was born here in 1750 and practiced until, fifty years later, he removed to Boston. He was appointed shortly thereafter Chief Justice of the Massachusetts Supreme Judicial Court. John Quincy Adams prepared for the Bar in his office, as likewise Rufus King. Another of his students who later attained great professional distinction and rose to the highest tribunal of his State was Samuel Putnam. It was under Putnam that Joseph Story finished his law studies.

The old Court House, designed by the celebrated architect Charles Bulfinch, was built at the very beginning of the 19th century. It was somewhat remodelled later, at which time—and doubtless without intending any invidious imputation thereby—the carved wooden statue of justice which surmounted it was removed. Within has been enacted many a legal drama, of which the most famous was probably that involving Levi and Leban Kenniston, who were tried and acquitted in 1816 for highway robbery of Major Elijah Putnam Goodridge, due to the strenuous efforts in their behalf by Daniel Webster of counsel.

Voltaire once said, "I should like to have been an advocate. It is the finest calling in the world." For the average lawyer the romance and glamor of his profession is in courtroom practice. His hero and idol is the great advocate. Of the great trial lawyers whom this country has produced, tradition assigns to none a higher place than that occupied by Rufus Choate. Though there were short political interludes in which he showed himself to be but an indifferent parliamentarian, the absorbing passion of his existence was the practice of the seductive art of dominating juries and persuading courts. His life was one of singular devotion to the ideal that he recommended when he declared that "the great aim of a young man should be advocacy." On bleak Hog Island, named for its resemblance to porcine-like contours and situated a very short distance off the coast of the town of Essex, then a fishing village, a few miles north of Salem on Cape Ann, Choate was born in 1799 in an old farmhouse which is still standing and which an ancestor had constructed seventy-five years earlier. It is situated on the east side of the island and looks out upon the restless Atlantic. The island was then, and had been for many years, occupied largely or wholly by the Choate clan, from whom incidentally sprung other lawyers of distinction. The year following, his family moved to the mainland and built a house on Spring Street which was occupied by them for many years. Though somewhat altered, this house still survives. In the last days of his ebbing life, his thoughts turned back to his early memories of the sea and the familiar sights of his youth. As he lay on his deathbed at Halifax, where he had been removed from the ship on which he had taken passage for the old world, with a view out over the harbor, he said, "If a schooner or a sloop goes by, don't disturb me, but if there is a square-rigged vessel, wake me up." In the lobby of the Suffolk County Court House at Boston, where he lived and labored during the last twenty-five years of his life, is a large, full length statue of him. In the bronze the sculptor, Daniel Chester French, has perhaps given posterity the best impression that it possesses of the dramatic power and dynamic personality of this unique and scintillating phenomenon of the law.

A thoughtful pilgrimage to the scenes of the great events of pioneer and Revolutionary days and of the formative period in our political institutions—such as those that have transpired in the land of the Puritans—brings home forcefully, and at a time when the lesson has a special importance, the leading role in our history played by members of our own profession. The past justifies our faith in a future of continued usefulness, and we find a certain inspiration in the words of De Tocqueville, "I cannot believe that a republic can subsist if the influence of the lawyers in the public business does not increase in proportion to the power of the people."

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# THE POWER OF THE FEDERAL COURTS TO DECLARE ACTS OF CONGRESS UNCONSTITUTIONAL

Challenges of the Authority of the Courts in This Regard Set out against the Historical Background and the Contemporary Foreground of the Constitution Itself—The American Idea of Judicial Review not an Offshoot of the Common Law but a Development of Colonial Practices—Invalidation of Colonial Acts—Right of Courts to Test Legislation under State Constitutions Asserted at Early Date—Later Developments Confirming Validity of Principle, etc.\*

By HON. JOHN H. HATCHER

*President of the Supreme Court of Appeals of West Virginia*

THE rulings of the Supreme Court of the United States on the N.R.A. and the A.A.A. have been followed by blustering challenges of the authority of the Court to declare an Act of Congress unconstitutional. This has occurred each time the Court has so ruled since 1803. The present challengers make the same time-worn charges as their predecessors, which are: (1) That because we derived our legal procedure from England, and the English courts claimed no power to review Acts of Parliament, it was unprecedented for the Federal courts to review Acts of Congress; (2) that this jurisdiction was "unknown" to the Fathers of the American Constitution; (3) that this jurisdiction was "unintended" by the Fathers; (4) that Chief Justice John Marshall originated the idea, and "put it over" in the case of *Marbury v. Madison* in 1803; and (5) that "There is not a line in the Federal Constitution \* \* \* to authorize the assumption of such power by the Courts; they have secured the power only by usurpation."

These charges ignore facts as well as logical sequence. Yet they were made in the last Congress without contradiction. They have been reiterated in occasional editorials without detailed refutation. Since the people ordinarily believe what they read, errors of fact on a subject so vital in our scheme of government should not go unexposed. Therefore, let us set these charges (as enumerated) against the historical background and the contemporary foreground of the Constitution.

*First.* It is quite true that English courts prior to 1787 (the date of the National Constitutional Convention) recognized the absolute supremacy of an Act of Parliament. That recognition, however, was not due to a conception of legislative immunity from judicial review, but to the fact that Parliament acted in a dual capacity—as both legislature and court. Parliament was a court (*curia regis*) before it ever assumed legislative powers; and it was and always had been from its inception the highest court of England. An Act of Parliament was both supremely legislative and supremely judicial.<sup>1</sup> Moreover, in the words of Viscount Bryce, one of England's greatest writers on constitutional law, "Parliament is not a body with delegated or limited authority. The whole fullness of popular power dwells in it. The whole nation is supposed to

be present within its walls."<sup>2</sup> Magna Charta and the other bulwarks of English liberty restrain only the kingly power. Parliament itself is subject to no constitutional restraint. Parliament is "omnipotent." (Bryce.) Congress has no judicial power (except in relation to its own members and to impeachments) and even its legislative powers are enumerated and limited by the Constitution. Consequently there is no ground whatever for judges to rank an Act of Congress as they would an Act of Parliament.

The few jurists who have controverted the judicial right to review congressional legislation have based their arguments largely on the common law esteem of Acts of Parliament. Each of those jurists overlooked the fundamental differences between Parliament and Congress; each overlooked the designation of Parliament in the Declaration of Independence as "a jurisdiction \* \* \* unacknowledged by our laws;" each overlooked the patent fact that the common law is not a part of the *supreme law of the land* as defined by the Constitution; and each overlooked the historical fact that the American idea of judicial review is not an offshoot of the common law but is a development of colonial practice, as I shall now demonstrate.

*Second.* The colonial governments in America were the issue of specific grants from the King and were thus "connected to England through the Crown and not through Parliament or any other governmental division of the kingdom." Long, *Genesis of the Constitution*. Those grants authorized the establishment of a limited form of self-government, and were usually called charters, although the ones to New Hampshire, New Jersey and North Carolina were styled constitutions. The comprehensive nature of those instruments is demonstrated by the fact that when the colonies renounced the rule of England, three states—Massachusetts, Connecticut and Rhode Island—adopted their several charters as their state constitutions with no change except the substitution of allegiance to the State for that to the King.<sup>3</sup> The colonial charters were in fact all constitutions,<sup>4</sup> and were generalized in the Declaration of Independence as "our constitution." The charters differed much in the specific power granted or denied; but they had this common provision, that local legislation *should not be contrary to the laws of England*. That provision was adapted from the Constitution of the Island of Jersey. The chronicle quaintly

\*Address delivered before the Bar Association of the City of Charleston, West Virginia, on Jan. 25, 1936.

1. Pope, 27 Harv. Law Rev. 45; Haines Am. Doctrine Jud. Supremacy 8, *et seq.*

2. Bryce, American Commonwealth, 246.

3. Bryce, 413 *et seq.*

4. Fowler, 29 Am. Law Rev. 711, 717-8; Haines, 65.

recites that "Jersey, Guernsey and their fellows (Channel Islands) are simply that part of the Norman Dutchy which claved to its dukes when the rest fell away."<sup>5</sup> And because Jersey claved to the line of Duke William, the Norman, after he conquered England in the eleventh century, Jersey became an English province. But it retained the right of self-government, under a constitution of its own, subject only to the power of the English King, acting through his Privy Council or other representative, to disapprove its local laws. That same power was expressly asserted in some of the colonial charters, but whether mentioned or not it was one Jersey practice which was common to all colonies.<sup>6</sup> Pursuant to that practice, the colonial laws were constantly tested by their charters and by the laws of England. The extent of that practice is shown by the fact that nearly four hundred acts of colonial assemblies were annulled by the Privy Council (or a body acting under it) because they did not pass that test. A noted instance was in the case of *Winthrop v. Lechemere* (1727-8), where the Privy Council held a Connecticut provincial Act of nearly thirty years standing to be invalid as "contrary to the law of the realm" and "against the tenor of their charter." The invalidation of a colonial Act was read at least once in every court, once in every church, and once at the military musters throughout the colony.<sup>7</sup> Thus the colonists became familiar with that practice. The provincial laws, says Professor Dickerson in his careful work on *American Colonial Government*, were constantly submitted to "a kind of constitutional test" and in this way the colonists grew accustomed "to a limitation upon their local legislatures." He further says: "The parallel between British colonial practice and present day United States practice is clear in the case of laws from chartered colonies, as the charter was a written constitution. The local legislature was limited by the terms of the grant (charter); if a power had not been granted, it could not be exercised legally."<sup>8</sup> How thoroughly charterminded the colonists became is illustrated by a decision of the judges of the Husting's Court of Northampton County, Virginia, shortly before the Revolution, holding that a certain Act of Parliament was not binding on the inhabitants of Virginia "inasmuch as they conceived said Act to be unconstitutional."<sup>9</sup>

Following the colonial period, some of the state legislatures, Parliament-like, attempted to assume absolute powers, but such assumptions met with general disapproval. The right of the courts to test legislation under the State Constitutions was quickly asserted in eight of the thirteen new states.<sup>10</sup> One J. H. Ralston of Washington, D. C., has published a survey of this period which would show that prior to 1787 judicial review of state legislation had been sporadic and unpopular. His publication is now cited as authority by the critics of the Supreme Court. His remarks should be accepted with caution. For example, he not only miscalled a leading Virginia decision "dicta," but further misdescribed it as follows: "In 1782, in Virginia, in the case of *Commonwealth v. Caton*, two judges asserted the right of the court to resist the unconstitu-

tional act of the legislature, and the third was doubtful."<sup>11</sup> The Virginia Court of Appeals, which decided that case, consisted of eleven judges instead of three. One judge was not doubtful of his right to pass on the constitutionality of the Act in question, but was of opinion that it was unnecessary to do so. "The rest of the judges were of opinion," in the words of the decision itself, "that the court had power to declare any resolution or act of the legislature \* \* \* to be unconstitutional and void," and they did declare the act "inoperative," because not passed in manner provided by the Virginia Constitution. The case is reported in 4 Call 5. The sentiment of that period towards the legislative assumption of judicial powers is well reflected in a request by the Continental Congress, made in April, 1787, to several state legislatures which had assumed the right to construe the recent treaty with England. The legislatures were requested to turn over all matters affecting the treaty "to its proper department, viz, the judicial." Several state judges who had taken part in the decisions on constitutional questions were members of the Federal Constitutional Convention. Much newspaper publicity was given the decisions, particularly in Philadelphia at the time the Convention was in session. Any question whatever as to the information of the Convention on this subject is removed by the notes of delegate James Madison. They show that within a few days after a quorum of delegates had assembled, Elbridge Gerry of Massachusetts said to the Convention: "In some states the judges had actually set aside laws as being against the Constitution." He further added: "This was done, too, with general approbation." So, instead of judicial power to determine the validity of legislation under a written constitution being an innovation in 1787, it had been exercised in America under colonial and state governments successively for a hundred years prior to the Convention.

*Third.* The opponents of the judicial review of legislation say that such review could not possibly have been intended by the founders, because the right was refused four times at the National Convention. The opponents refer to the rejection of a so-called *council of revision*. Here are the unvarnished facts. The Virginia delegates proposed to the Convention a council on which the judiciary should share with the chief executive the power to veto Congressional legislation. Advocates of the council admitted frankly that in exercising the veto power, the judges would pass on the policy as well as the validity of laws. The same two arguments were advanced against the council each time it was presented to the Convention. One argument was that the policy of the law was a legislative and not a judicial matter. The other argument, as expressed by delegate Luther Martin, was that "The constitutionality of laws \* \* \* will come before the judges in their official character. In this character they have a negative on the laws." Thus the facts demonstrate, first, that it was the veto power, as such, which was denied the judiciary, and second, that a major reason for the denial was the understanding of Martin and his associates (the majority) that the Constitution they were framing would confer on the judiciary the right to review Congressional legislation. Of the fifty-five delegates who attended the Convention, only three—Bedford, Mercer and Dickinson—clearly expressed themselves against judicial review, and they did not press their views. Their failure to do so, is not specifically explained. It does

5. 6 Larned History 4837.

6. Russell, Am. Col. Leg. 221; Thayer, Leg. Ess. 199-200; 5 McMasters Hist. U. S. 394; Dicey, Const. 160; Fowler, 21 Am. Law Rev. 399, 405 *et seq.*

7. 2 Bruce Inst. Hist. Va. in 17th Century, 507.

8. Am. Col. Gov. 234 *et seq.* Accord: Greene, Foundations of Am. Nationality, 203, 239; Haines, ch. III; Thayer 3; Andrews Col. Background, 49, 50.

9. 5 McMasters, 354-5.

10. Meigs, 19 Am. Law Rev. 175, *et seq.*; Haines, ch. V; Fowler, 29 Am. Law Rev. 711, 721-2.

11. 54 Am. Law Rev. 1.

appear, however, that after the Convention was assured "that the jurisdiction given (the federal courts) was constructively limited to cases of a *judiciary nature*," the amendments which phrased the jurisdiction in its final form (Article III of the Constitution) were passed "*nem con*," the classical slang of Madison for *no one against*. (Incidentally, it also appears that Dickinson later favored judicial review.)

Dean Trickett of the Dickinson College law school fancied himself brilliantly sarcastic when he referred to the Supreme Court as "pretending to have marconigrams from the defunct men of 1787 and 1788 concerning their meaning when they adopted this or that phrase of the Constitution." Instead of being sarcastic, the Dean was simply amusing. There is no need of marconigrams from the men of 1787-8 on the meaning of Article III. They left their construction in writing too plain to be misunderstood. Under the title "Genuine Information," Luther Martin reported to the legislature of his state (Maryland) in November, 1787, the proceedings of the Convention and explained in detail the meaning of the several provisions of the Constitution. With reference to the power vested in the Federal Courts by Article III, he wrote: "These courts and these only will have a right to decide upon the laws of the United States and all questions arising upon their construction \* \* \*. Whether, therefore, any laws or regulations of the Congress, or any acts of its President or other officers, are contrary to, or not warranted by the Constitution, rests only with the judges \* \* \* to determine." In publications (The Federalist) explaining the Constitution to the people of the State of New York, Alexander Hamilton, also a member of the National Convention, placed the same construction on Article III as that of Martin. In the debates before the several State Conventions which ratified the Constitution, James Wilson of Pennsylvania, Oliver Ellsworth of Connecticut (later a Chief Justice of the Supreme Court of the United States), W. R. Davie of North Carolina, and George Mason of Virginia, all members of the National Convention, and delegates Samuel Adams in Massachusetts, and Patrick Henry, Edmund Pendleton, John Marshall, George Nicholas and William Grayson, in Virginia, each construed Article III like Martin. (That very construction was used by some as the basis for attacking the Constitution.) The reports of the proceedings in the other State Conventions are fragmentary or incomplete; but there is no record of a single explicit dissent to that construction in any of the Conventions. Newspapers published in 1788-9, in every State from North Carolina to Massachusetts, inclusive, whether friend or foe of the Constitution, uniformly construed Article III to empower the Federal Judiciary to pass on the constitutionality of Congressional legislation.<sup>12</sup> That construction was even reflected in a London newspaper of that era in an article written by a New York correspondent.

A prominent eastern newspaper recently disparaged judicial review not only as usurpative, but as "abhorrent to our American system of government." No precedent for that aspersion can be found in the records of the early sessions of Congress. The first Congress met in 1789. That Congress is accredited with ninety members, of whom eighteen had been delegates to the National Convention, and thirty-one had been delegates to the State Conventions which had ratified the Constitution. Thus the Constitution makers dominated that Congress. The right of judicial review

was not only treated by those Congressmen as a matter of course, but was extolled by some, Elias Boudinot—the friend and counsellor of Washington—saying that this right "was his boast and his confidence." I could find that right questioned by only one member, James Madison, who, while doing so, inconsistently admitted that "in the ordinary course of government, the exposition of the laws and constitution devolves upon the judiciary." The Federal Judiciary Act passed by that Congress explicitly recognized the right of the Supreme Court on appeal from state courts, to review Acts of Congress. That recognition has continued unto this very day and may be found in the present Federal Code, Title 28, section 344. Had those Congressmen who recently spoke so contemptuously of judicial review given thoughtful consideration to the Federal Judiciary Act, they might have been freed, in the words of Burns, from many a blunder and foolish notion. The right of judicial review was repeatedly declared in succeeding sessions of Congress without any concerted opposition until 1802. Those early Congressmen were overwhelmingly in accord with the construction given to Article III by the members of the National, and the State, Conventions, respectively. After reviewing with great care the utterances of the Congressmen on this subject from 1789 to 1802, Warren in his book, *Congress, the Constitution, and the Supreme Court*, observes: "Hence it is an especially striking fact that members of Congress, of both parties (Federalist and Anti-Federalist) should have been practically united in one sentiment at least, that under the Constitution it was the Judiciary which was finally to determine the validity of an Act of Congress."<sup>13</sup>

In 1802, for the first time in the history of Congress, John Breckenridge of Kentucky, the Jeffersonian leader in the Senate, attempted the organization of a movement to establish the exclusive right of Congress "to interpret the Constitution in what regards the law-making power." Opponents of judicial review quote with much unction the rhetorical denunciation thereof by Senator Breckenridge; but they do not quote the replies to Breckenridge or say what happened to his attempt. Notwithstanding his prestige, he made small progress with his doctrine, being supported only by a few associates from Virginia, Kentucky, Georgia and North Carolina, a hopeless minority. Breckenridge had taken before the Kentucky Legislature in 1798, the exact reverse of the position he advanced in Congress in 1802.<sup>14</sup> His sincerity has been further impugned by some writers.<sup>15</sup> The motives for his attack on judicial review, however, have nothing to do with the right of such review. That right must be determined from the Constitution itself, irradiated by contemporary thought. The speech of Breckenridge before the Senate presenting his position falls in that respect. He did not attempt to analyze the language of the Constitution, or to elucidate its meaning from the expressions of the Constitution makers, or from the sentiment of the Constitution making period. After some declamatory questions about the Constitution, he merely summarized what he called his "idea on the subject" without giving a substantial basis for that idea. None of his supporters were more convincing. Conceding proper motives, the personal ideas of the Breckenridge coterie on the science of government, unaccompanied by argument, are of little weight on what the Constitution was intended to mean, what it was contemporaneously construed to mean, and what its

12. Warren, 65-6; Ford Pamphlets on the Constitution; Ford, Essays on the Constitution.

13. Warren, 99.

14. Warren, 215.

15. Warren, 219.

phrases fairly defined do mean. Many of the Fathers of the Constitution were still alive in 1802. Some were members of that Congress. It was close enough in point of time to 1787 for the Congressmen to be thoroughly familiar with the thoughts of the Fathers on Article III. Those thoughts are manifested in the summary manner Congress spurned the Breckenridge doctrine. It was referred to by Representative Henderson of North Carolina in these words: "The monstrous and unheard of doctrine which has been lately advanced"; and by Senator Ross of Pennsylvania in these: "By this horrid doctrine, Congress erects itself into a complete tyranny." Democrats united with Federalists in repudiating the Breckenridge doctrine. The stalwart Northern Democrat, Bacon of Massachusetts, voiced the sentiments of most of his associates when he asserted on the floor of the House that it was not only the right of the Federal judges but it was "their indispensable duty \* \* \* to judge for themselves on the constitutionality of every statute on which they are called to act."

Immediately following the organization of the Federal Court by Congress in 1789, the Federal judges commenced to assert their right to review legislation. One of those early jurists was Associate Justice William Patterson, who had been a member of the National Convention. A more positive pronouncement of this right was never made than one by him in 1795 (in *Vanhorne v. Dorrance*, 2 Dal. 304, 309), as follows: "I take it to be a clear position, that if a legislative act oppugns a constitutional principle, the former must give way and be rejected on the force of repugnance. I hold it to be a position equally clear and sound that in such case it will be the duty of the court to adhere to the Constitution and to declare the act null and void." It will be remarked that this pronouncement was made six years before John Marshall's appointment to the Supreme Court, which did not occur until 1801. I am mindful that Associate Justice Chase approached that construction hesitantly in 1796 (*Hylton v. U. S.*, 3 Dal. 171, 175); but in 1800 (*U. S. v. Callender*, 25 Fed. Cas. 239, 253, 256-7) after he had "deliberately considered the subject" (his words) he asserted the doctrine of judicial review just as strongly as had Justice Patterson, refusing even to hear argument to the contrary by Attorney General Wirt of Virginia.

It would seem that the uniform construction placed on Article III by the delegates who phrased it, by the contemporary publications, by the State Conventions which ratified the Constitution, by the early sessions of Congress, and by the early Federal judges would have established that construction beyond peradventure.

Fourth. However, in 1803, John Marshall, Chief Justice of the Supreme Court, wrote the opinion in the case of *Marbury v. Madison*, which was destined to become the controversial case on this subject. The facts in that case are of no consequence here; it became controversial not because of its facts, but because Thomas Jefferson took umbrage at what he termed an "obiter dissertation" in the opinion, pronouncing the right of the court to review Acts of Congress. The critics of the Supreme Court have placed such emphasis on Jefferson's opposition to judicial review that some comment thereon seems pertinent. He was fundamentally a states' rights man. The expansion of National power under the Federal Government had been particularly odious to him. He had attempted to check that expansion through the celebrated Vir-

ginia and Kentucky Resolution of 1798, wherein the respective legislatures of those two states protested to the other states that certain Acts of Congress were infractions of the Constitution, and that the states had the inherent right to say so. North Carolina, South Carolina and Georgia did not either formally approve or disapprove the Resolutions.<sup>16</sup> Delaware and Connecticut disapproved the Resolutions in strong terms. Rhode Island, Massachusetts, New York, New Hampshire, Vermont and Pennsylvania not only disapproved the Resolutions, but expressly stated that the authority to declare Acts of Congress unconstitutional was vested exclusively by the Constitution in the Federal courts. The reply of Rhode Island to Virginia (in February, 1799) illustrates the position taken by the six states last mentioned, to-wit: "In the opinion of this legislature the second section of third article of the Constitution of the United States, in these words, to-wit, 'The judicial power shall extend to all cases arising under the laws of the United States' vests in the Federal courts exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States."<sup>17</sup> And mind you—this was also done before John Marshall wrote *Marbury v. Madison*. The attitude of the other states towards the Virginia and Kentucky Resolutions was a keen disappointment to Jefferson. Upon his election as president, shortly afterwards, he then contemplated checking federal expansion through the federal court. To that end, he planned to make his adherent, Spencer Roane of Virginia, Chief Justice of the Supreme Court. Jefferson was frustrated in this through the last-minute appointment of Marshall to that office by the retiring President Adams. It is now accepted that two bitter political enemies never lived within the bounds of the Old Dominion than Jefferson and Marshall.<sup>18</sup> "From the day of Marshall's appointment," says Haines, in *The American Doctrine of Judicial Supremacy*, "Jefferson planned for his removal and aimed to curb the powers of his court."<sup>19</sup> Jefferson's partisanship must have been at least a factor in his opposition to judicial review. For, in his Notes on Virginia, written in 1781, he had strongly criticized the very theory of government later proposed by his lieutenant, Breckenridge, in Congress, saying that the assumption of judicial and executive powers by the Virginia legislature was "precisely the definition of despotic government."<sup>20</sup> Furthermore, Jefferson was in France while the Constitutional Convention was in session and had no part whatever in phrasing Article III. Now who should be preferred on the construction thereof, the Fathers or Jefferson?

That same Mr. Ralston, heretofore referred to, says that Marshall in 1796 as counsel in *Ware v. Hylton* advocated precisely the opposite view to that expressed in *Marbury v. Madison*. Again, I find that Mr. Ralston is in error. In *Ware v. Hylton*, Marshall was discussing a Virginia Act under the Virginia Constitution (which has no provision similar to Article III of the Federal Constitution) and he did not even mention the powers of the Federal Courts under the Federal Constitution.

Five associate justices sat with Marshall in 1803. Three of his associates—Patterson, Chase and Cush-

16. Haines 190-1.

17. 4 Elliott's Debates on Fed. Const. 528, et seq.

18. Dodd, Am. Hist. Rev., July issue 1907.

19. Haines, 241.

20. Jefferson, 174.

ing—had prior thereto unequivocally declared in favor of the right of judicial review. A fourth associate—Bushrod Washington—had been a member of the Virginia Convention which ratified the Constitution, and there had heard it unanimously construed to grant that right. The statement that Marshall coerced or even influenced the Court to concur in *Marbury v. Madison* is purely arbitrary. In that opinion, he merely restated the sentiment previously declared not only by three of his associate justices and by six sovereign states, but in the words of Senator Beveridge, “by hundreds of men.”<sup>21</sup> The arguments in that opinion are simply repetitions of the arguments made in the Congressional debates in 1802 (particularly those of Representatives Hemphill, Stanley, Dana and Bacon). Instead of that opinion being the root, it was the flower of a growth rooted in America a century before. That opinion, however, caused the embers kindled by Breckenridge in 1802 to flare again. The animosity of the Jeffersonian group against Marshall led its extremists either to forget or to overlook the history and precedents supporting the right of judicial review, and (after a few years) to characterize the opinion in *Marbury v. Madison* as an original and dangerous usurpation of power. And from that time to this, those who oppose the right of judicial review, ordinarily ignore its genealogy and continue to signalize *Marbury v. Madison* in the same manner as the Jeffersonian extremists. A recent Congressional Record quotes a Representative from West Virginia as stigmatizing *Marbury v. Madison* as “the most brazen judicial announcement ever made.” According to the Record, he attributed to justices of the peace the power, under that opinion, to nullify Acts of Congress, and he then proceeded to “stand aghast” and “to shudder and wonder what the outcome will be.” How unfortunate for this patriot to have suffered in that manner, when his tremors could have been averted by even a casual acquaintance with the facts.

*Fifth.* When the Fathers strove so insistently to perfect a government different from the Parliamentary government of England, and to achieve the absolute independence of the judiciary, it is inconceivable that the Constitution produced by their care and thought should intend for the Federal Judiciary to be bound by the constitutional exposition of Congress—a *non-judicial department*. One looks in vain in the Constitution for any reflection of such intention. Congress, being an artificial creation of the Constitution, can exercise only such powers as the Constitution confers. Article I, section 1, brings Congress into being with the fiat “All legislative powers herein granted shall be vested in a Congress of the United States.” Mark the language: *All* legislative powers are not vested in Congress, but only such powers as are therein granted. Thus, Congressional legislative powers are special and limited. That limitation was not casual but deliberate. The delegates to the National Convention had noted “a powerful tendency in the legislature to absorb all power into its vortex” (according to Madison), also its tendency to heed popular clamor and selfish interests (according to Morris), and all agreed that a check on Congress was necessary (according to Gor-

ham). The specific powers granted Congress are named in section 8 of Article I and include the power “to make all laws which shall be necessary and proper for carrying into execution” the powers vested “by this Constitution in the Government of the United States.” There is not even a hint that Congress can exercise any judicial power (except in relation to its own members and to impeachments) such as confirming the legality of its own Acts. Section 8 fixes the absolute boundary of Congressional action in relation to laws. Judicial exposition of laws is beyond that boundary, and therefore beyond the range of Congress.

After conferring on Congress the right to determine its own membership and on the Senate “the whole power to try all impeachments,” the Constitution vests “the judicial power” of the United States in the Federal courts. That phrase—“the judicial power”—must mean all the remaining judicial power, especially since there is no further blending whatever of judicial and legislative powers and no further delegation of any judicial power. (This was expressly conceded by Madison, in the House in 1789). To make plain the extent of that investiture, the Article further provides that the judicial power “shall extend to all cases in law and equity, arising under \* \* \* the laws of the United States.” What is judicial power? It is the power “to declare the law.” What are the laws of the United States? They are the Constitution, the laws passed by Congress in *pursuance of the Constitution*, and all treaties made under the authority of the United States. (Constitution, Article VI.) Thus the Constitution does have a line authorizing the Federal courts to *declare the law* in any case in law or equity arising under the Acts of Congress. *And what a comprehensive line it is!* Every case before those courts is either in law or in equity. A line conferring more absolute jurisdiction in cases which involve Acts of Congress cannot be conceived; for the power to declare the law necessarily comprises the right of determining what is the law and of rejecting what is not the law. Article VI further makes those three classes of laws “the supreme law of the land.” An Act of Congress “made in pursuance” of the Constitution, thereby becomes the lawful equal of the Constitution itself. But an Act repugnant to the Constitution is not made in pursuance thereof—is not “proper for carrying into execution” the powers vested thereby in the Government of the United States (as prescribed in Article I, section 8)—and is not the legal offspring of constitutional government. Such an Act has no place in that trinity which constitutes the supreme law of the land. In a case where a court must declare whether the Constitution or an unconstitutional Act is the law, it would be the duty of the court under the general conception of judicial duty to prefer the Constitution as paramount. The duty is made absolute by the judicial oath prescribed by the Constitution itself, which binds the judges, “to support this Constitution.” Under that oath, they cannot Pilate-like, wash their hands when confronted with a patent violation of the very instrument they are sworn to support, merely because another department of government has failed in that support. The oath to support has no exception. It permits no evasion. It requires exposition of every such violation whereon the court is required to declare the law. And since that duty is imposed on judges by the Constitution, by amendment alone, so long as the Constitution shall endure, can that duty be revoked.

21. 3 Life of Marshall, 118.

The statements of what occurred in the Federal Convention and the State Conventions are taken for the most part from Elliott's *Debates on the Federal Convention*, and Farland's *Records of Federal Convention*; and the statements of what occurred in Congress are taken from the *Annals of Congress* first and seventh sessions.

# THE INFLUENCE OF THOMAS ALLEN AND THE "BERKSHIRE CONSTITUTIONALISTS" ON THE CONSTITUTIONAL HISTORY OF THE UNITED STATES

Continuity of Constitutional Thinking in New England from 1630 Lies in the Background of the Story—Petition from the Town of Pittsfield, Drawn by Thomas Allen and Presented to General Court in 1776—Other Events Leading to the Constitution of Massachusetts and Contributing to the National Constitution—A Neglected Chapter in Constitutional History, etc.

By FRANK W. GRINNELL

*Secretary of the Massachusetts Bar Association*

IN VIEW of the approaching meeting of the American Bar Association in Boston next August, a generally forgotten story of the work of "forgotten men" in Massachusetts history and its relation to the much-discussed topic of the judicial function in applying the constitution as the dominant law, may add to the interest of the members of the association in coming to Massachusetts.

The clear and simple story of the "Berkshire Constitutionalists," their influence in securing the Massachusetts Constitution and the almost immediate judicial application of it as law by Chief Justice William Cushing and his associates in 1781, seems to have been entirely overlooked by the authors of the many articles and books on the relation of the courts to legislation.<sup>1</sup> Also, perhaps, it is not without significance that this same William Cushing, who was the first judge appointed to the Supreme Court of the United States by Washington and who refused the chief justiceship in 1796, was a member of the court which rendered Marshall's opinion in *Marbury v. Madison* in 1803. Cushing was a member of the court until his death in 1810. During the last few years of his life he was feeble, but in 1803, he must have had some ideas on a subject as to which he had been a pioneer during the most vigorous period of his life.

Farnum, in his "Life of Francis Parkman," quotes Parkman as saying, "Damn the dignity of history. Straws are often the best materials." This should be remembered and pondered by students of history;<sup>2</sup> but it does not mean that there is no dignity in history. It is too common in discussing government to approach it as a study of powers, but the deeper study, particularly of our American theory of government, is the study of duties both of officials and of private citizens, because our constitutions grew out of a healthy, even if, at times, excessive, distrust of power, and created,

or rather recognized, "great duties," suggested by Otis as safeguards against the seductive influence of power.

In the background of our Massachusetts story is the often underestimated continuity of constitutional thinking in New England from 1630 on. One of the best accounts of this continuity of thinking appears in the first eleven chapters of Professor McLaughlin's very recent "Constitutional History of the United States." As he says (p. 91):

"We are not likely to over-emphasize either the fact of the English rebellion and the later peaceful revolution (1688) or the thinking that underlay revolt . . . this seventeenth-century thinking was especially cherished by the New England colonists. This was so in part because the early New Englanders were the offspring of the protest against Stuart absolutism."

This century or more of thinking led up to the arguments of Otis against the Writs of Assistance in the Old State House in 1761, and his subsequent pamphlets,<sup>3</sup> in one of which he said:

"The end of government being the good of mankind points out its great duties . . . Men cannot live apart or independent of each other . . . and yet they cannot live together without contests. These contests require some arbitrator to determine them. The necessity of a common, indifferent and impartial judge makes all men seek one," and again, "No legislative supreme or subordinate has a right to make itself arbitrary."

As Mr. Justice Holmes has said, he "laid one of the foundations for American constitutional law."

Otis and John Adams, after him, were great suggesters. Otis referred constantly to Lord Coke, Lord Holt and others, and as stated by Horace Gray in his note in Quincy's Reports (pp. 526, 527), "At the time of Otis' argument his position appeared to be supported by some of the highest authorities in English law."<sup>4</sup> It is not material to what extent he was historically sound in the light of modern research and analysis in his reference to his precedents as to the test of the "law of God." Of course, he, as well as his successors, realized that that is a somewhat vague test to be applied by courts in such matters. The point is that the general

1. I have found no reference to it in James B. Thayer's "Legal Essays"; Charles Warren's "Congress, The Constitution and The Supreme Court"; Haines' "The American Doctrine of Judicial Supremacy"; Boudin's "Government By Judiciary"; McLaughlin's "The Courts, the Constitution and Parties"; Brinton Cox's "Judicial Power and Unconstitutional Legislation"; Corwin's "The Doctrine of Judicial Review" or in the many articles that I have read on the subject.

2. Compare Andrews, "The Colonial Background of the American Revolution."

3. "John Winthrop and the Constitutional Thinking of John Adams," in Proceedings of Mass. Historical Society, Vol. 63; McIlwain's "The American Revolution"; Prof. Charles F. Mullett's "Fundamental Law and the American Revolution" and "Some Political Writings of James Otis," edited by Prof. Mullett in the "University of Missouri Studies." See also, "James Otis and His Influence as a Constructive Thinker," *Mass. Law Quarterly* for May, 1935.

4. McIlwain's "High Court of Parliament."

sentiment of Massachusetts developed with the central idea that courts could and should disregard legislation as void, if contrary to fundamental "constitutional principles" of restraint, even though those principles were then *unwritten* and it was the purpose of written constitutions containing a bill of rights and a frame of government to embody such principles as *law*.

John Adams used the same argument before the governor and council when he appeared with Gridley and Otis in opposition to the Stamp Act (See Adams' Works, Vol. II, pp. 154-160). In memoranda which he used at that argument appear these notes, "The law is the subject's best birthright." "Want of right and want of remedy is all one; for where there is no remedy there is no right," and other similar statements with references to Coke's "Institutes" (See p. 159.)<sup>5</sup>

Hutchinson, the Royal Chief Justice of Massachusetts, in 1765, speaking of the opposition to the Stamp Act, said:

"The prevailing reason at this time is, that the act of Parliament is against Magna Charta, and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void."

And on September 12, 1765, Hutchinson wrote: "Our friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is *ipso facto* void." (Quincy, 527 and 441.)

This idea was so strong that it even got into the early seal of the Massachusetts Colony, adopted in July, 1775, which was "an English American holding a sword in the right hand and Magna Charta in the left hand, with the words 'Magna Charta' imprinted on it." (Quincy 468.)

Thomas Paine, whose pamphlet "Common Sense," first appeared early in 1776, of which thousands of copies were printed and distributed throughout the colonies, after urging a conference of representatives to frame a continental charter like Magna Charta, said:

"Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth, placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far we approve of monarchy, that in America, THE LAW IS KING." (Ed. February, 1776, pp. 47, 48.)

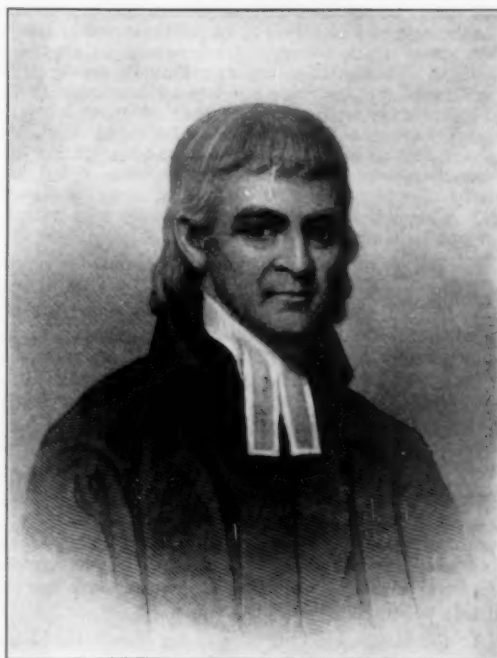
On May 28, 1776, William Cushing, then recently appointed to the reorganized court, wrote to John Adams, then in Philadelphia:

"I can tell the grand jury the nullity of acts of parliament, but must leave to you to prove the more powerful arguments of the *jus gladii divinum*, a power not peculiar to kings or ministers." (See Note, Adams' Works, Vol. IX, p. 391.)

Adams, then Chief Justice of the Court, answered by letter of June 9, 1776. This letter was less than a month before the Declaration of Independence, and in it he said:

"You have my hearty concurrence in telling the jury the nullity of acts of parliament, whether we can prove it by the *jus gladii* or not. I am determined to die of that opinion, let the *jus gladii* say what it will."

Adams was then in the midst of the critical period of the debate leading up to the Declaration of Independence by which the people of the country were fortified during the Revolution, which "proved" as Cushing said by "the *jus gladii divinum*" the nullity of arbitrary



THOMAS ALLEN, the fighting parson of Berkshire County, who fired the first shot at the Battle of Bennington, and who was leader of the "Berkshire Constitutionalists."

acts of parliament as the basis of the constitutional law of the United States.

It is apparent from such passages that these men were working not merely for a government of laws in the abstract, but for a government of *applied* laws, and when the Adamses and their associates, who succeeded Otis, came to frame a constitution in 1779-80, they expressed principles with the intention that they should be *applied* as law, and they did it with the approval of those people of Massachusetts who believed in having a "compact"<sup>6</sup> of government which could be relied on as a restraint of power. The best evidence of this comes from the farmers of Berkshire County, known as the "Berkshire Constitutionalists." We find, in the much-neglected volumes of Smith's "History of Pittsfield," the account of the effective movement leading to the Massachusetts Constitution of 1780, which is still the operative instrument of government because it has worked.

The following passages are taken from Volume I of Smith's "History," of which Chapters XVIII to XX may be referred to for fuller details of what took place:

"While one class of minds was patiently and laboriously seeking material for the new structure in the treasured experience of the past, another was seizing eagerly upon whatever in the more recent and popular essayists

6. The word "compact" or "social compact" as defined in the Preamble to the Massachusetts Constitution excites comment and even ridicule in some minds because it is in the language of eighteenth century thinking, but we must not forget that John Adams and his associates were very practical men confronted with a crisis, and that the idea of a "social compact" meant to him and to others in Massachusetts at that time, what the charter meant to John Winthrop in 1630. Today, this "compact," the substance of which we are still living under, resembles a fiduciary "compact" or trust, rather than a bilateral contract, and with the greater familiarity with equitable conceptions which we have today, the word "compact" in this fiduciary sense seems an accurate description of the trusts of government "for ourselves and posterity" of which we are all beneficiaries.

5. Similar ideas run through the letters of "Novanglus" (John Adams) published in 1774 in the "Boston Gazette" in answer to the letters of "Massachusettensis" (Daniel Leonard), which appeared in the "Massachusetts Gazette." (See Adams' Works, Vol. IV, p. 4.)

seemed sustained by facts and adapted to the desired end. It was the age of free thinking in political creeds, and of a chaos out of which something very nearly perfect at last crystallized. The agitation and new thought developed by the writers of the day were not less indispensable to the grand result than were the researches of more scholarly statesmen. Between the two classes indicated, Rev. Mr. Allen occupied an intermediate position; although his natural impulsiveness, as well as other influences, led him generally to adopt the most advanced theory of human rights. A republican by birth and education, he was an ardent one by temperament" (pp. 335, 336).

The judges of the king's courts were first prevented from sitting in Great Barrington in 1774 (Smith, pp. 194-196). No courts were held in Berkshire for six years until the re-organization of the judiciary under the constitution of 1780. "During the interregnum, the local authorities preserved public order, and restrained crimes against person and property, far from perfectly, it is true, but less imperfectly than was to have been expected; and the want of the civil courts was not so severely felt in business relations as it would have been in communities with larger and more complicated mercantile interests." (Smith, pp. 348-349).

In May, 1776, a petition from the town of Pittsfield, which was drawn by Thomas Allen, was sent to the General Court. The following extracts are quoted from this petition:<sup>7</sup>

"To the Honorable Council and the Honorable House of Representatives of the Colony of Massachusetts Bay in General Assembly met at Watertown, May 29, 1776.

"The petition and memorial of the town of Pittsfield in said Colony humbly sheweth,—

"That they have the highest sense of the importance of civil and religious liberty, the destructive nature of tyranny and lawless power, and the absolute necessity of legal government to prevent anarchy and confusion. . .

"That from the purest and most disinterested principle and ardent love for their country, without selfish consideration, and in conformity with the advice of the wisest men in the Colony, they ordered and assisted in suspending the executive courts in this county in August, 1774. . .

"That when they came more maturely to reflect on the nature of the present contest and the spirit and obstinacy of administration (p. 351)— . . .

"when they further considered that the revolution in England afforded the nation but a very imperfect redress of grievances,—the nation, being transported with extravagant joy in getting rid of one tyrant, forgot to provide against another—and how every man by nature has the seeds of tyranny deeply implanted within him, so that nothing short of Omnipotence can eradicate them: . . .

"That when they considered that now is the only time we have reason ever to expect for securing our liberties and the liberties of future posterity upon a permanent foundation that no length of time can undermine,—though they were filled with pain and anxiety at so much as seeming to oppose public councils, yet, with all these considerations in our view, love of virtue, freedom, and posterity prevailed upon us a second time to suspend the courts of justice in this county, . . .

"We further beg leave to represent that we are deeply affected at the misrepresentations that have been made of us and the county in the General Court as men deeply in debt, dishonest, ungovernable, heady, intractable, without principle and good conduct, and ever ready to oppose lawful authority, as mobbers, disturbers of peace, order, and union, unwilling to submit to any government, or even to pay our debts; so that, we have been told, a former House of Representatives had it actually in contemplation to send an armed force, to effect that by violence which reason only ought to effect the present day. We beg

leave, therefore, to lay before your Honors our principles, real views, and designs in what we have hitherto done, and what object we are reaching after; with this assurance, that, if we have erred, it is through ignorance, and not bad intention.

"We beg leave, therefore, to represent that we have always been persuaded that the people are the fountain of power; that, since the dissolution of the power of Great Britain over these Colonies, they have fallen into a state of nature.

"That the first step to be taken by a people in such a state for the enjoyment or restoration of civil government among them is the formation of a fundamental constitution as the basis and ground-work of legislation; that the approbation, by the majority of the people, of this fundamental constitution is absolutely necessary to give life and being to it; that then, and not till then, is the foundation laid for legislation.

"We often hear of the fundamental constitution of Great Britain, which all political writers (except ministerial ones) set above the king, Lords, and Commons, which they cannot change; nothing short of the great rational majority of the people being sufficient for this.

"A representative body may form, but cannot impose said fundamental constitution upon a people, as they, being but servants of the people, cannot be greater than their masters, and must be responsible to them; that, if this fundamental constitution is above the whole legislature, the legislature certainly cannot make it; it must be the approbation of the majority which gives life and being to it; that said fundamental constitution has not been formed for this Province; the corner-stone is not yet laid, and whatever building is reared without a foundation must fall to ruins;

"That a doctrine newly broached in this country . . . that the representatives of the people may form just what fundamental constitution they please, and impose it upon the people . . . appears to us to be the rankest kind of Toryism, the self-same monster we are now fighting against. These are some of the truths we firmly believe, . . .

"We beg leave further to represent, that we by no means object to the most speedy institution of legal government through this Province, and that we are as earnestly desirous as any others of this great blessing.

"That knowing the strong bias of human nature to tyranny and despotism, we have nothing else in view, but to provide for posterity against the wanton exercise of power, which cannot otherwise be done than by the formation of a fundamental constitution (pp. 352, 353).

"What is the fundamental constitution of this Province? What are the inalienable rights of the people? the power of the rulers? how often to be elected by the people, etc? Have any of these things been as yet ascertained? Let it not be said by future posterity, that in this great, this noble, this glorious contest, we made no provision against tyranny among ourselves.

"We beg leave to assure your Honors, that the purest and most disinterested love of posterity, and the fervent desire of transmitting to them a fundamental constitution, securing to them social rights and immunities against all tyrants that may spring up after us, has moved us in what we have done. We have not been influenced by hope of gain, or expectation of preferment and honor; we are no discontented faction; we have no fellowship with Tories; we are the staunch friends of the union of these Colonies, and will support and maintain your Honors in opposing Great Britain with our lives and treasure. But even if commissions be recalled, and the king's name struck off them; if the fee-table be reduced never so low, and multitudes of other things be done to still the people,—all is to us nothing while the foundation is unfixed, the corner-stone of government unlaied. We have heard much of government being founded in compact: what compact has been formed as the foundation of government in this Province? We beg leave further to represent, that we have undergone many grievous oppressions in this country, and that now we wish a barrier might be set up against such oppressions,

7. The italics do not appear in the petition, except in the case of the words "all is to us nothing" in the third paragraph from the end, as quoted by Smith.



WILLIAM CUSHING, Justice Superior Court of Judicature, Chief Justice of Massachusetts, and Justice of the Supreme Court of the United States.

against which we can have no security long till the foundation of government be well established. . .

"We beg leave further to observe, that, if this honorable body shall find that we have embraced errors dangerous to the safety of these Colonies, it is our petition that our errors may be detected, and you shall be put to no further trouble from us; but, without an alteration in our judgment, the terrors of this world will not daunt us. We are determined to resist Great Britain to the last extremity, and all others who may claim a similar power over us. Yet we hold not to an *imperium imperio*; we will be determined by the majority.

"Your petitioners, therefore, beg leave to request that this honorable body would form a fundamental constitution for this Province, after leave is asked and obtained from the Honorable Continental Congress, and that said constitution be sent abroad for the approbation of the majority of the people of this Colony; that, in this way, we may emerge from a state of nature, and enjoy again the blessings of civil government. In this way the rights and blessings of civil government will be secured, the glory of the present Revolution remain untarnished, and future posterity rise up and call the Honorable Council and House of Representatives blessed; and, as in duty bound, will ever pray.

"Attest:

"ISRAEL DICKINSON, Town Clerk"  
(pp. 353, 354).

In August, 1778, after the legislature's attempt to frame a constitution, which was subsequently defeated, a convention was held at Pittsfield which voted to request the several towns of the county to take a vote *whether they wished the courts to be held in the county "before a Bill of Rights and Constitution were framed and accepted by the people."* The result of this vote in the towns was in the negative by a large majority.

"The county having again, by decisive majority, refused to admit the courts, the following gentlemen were appointed to draft still another petition for a constitutional convention: James Harris of Lanesborough, William Whiting of Great Barrington, William Williams of Pittsfield, Benjamin Pierson of Richmond, and William Walker of Lenox. The petition reported by them, like those which

preceded it, recited the great military services of the county, its devoted faithfulness to the patriotic cause, the readiness of the people to fly to the assistance of their brethren on every alarm, and their abhorrence of Toryism. It then proceeds thus:—

"Notwithstanding this our fidelity to the State and our exertions for the common cause, we have, by designing and disaffected men, been represented as a mobbish, ungovernable, refractory, licentious, and dissolute people; as we conceive, on account of our not admitting the course of common law.

"It is true we were the first county that put a stop to courts, and were soon followed by many others,—nay, in effect, by the whole state; and we are not certain but that it might have been as well, if not better, had they continued so, rather than to have law dealt out by piecemeal, as it is this day, without any foundation to support it; for we doubt not we should, before this time, have had a bill of rights and a constitution, which are the only things we at this time are empowered to pray for.

"And we do now, with the greatest deference, petition your Honors, that you should issue your precepts to all the towns and places within this State called upon to pay public taxes, requiring them to choose delegates, to sit as soon as may be in some suitable place, to form a bill of rights and a constitution for this State; without which we shall retain the aforesaid character, if grounded upon the non-admission of law, as abundantly appears to us this day by the yeas and nays from the respective towns we represent, taken in town-meeting officially called for that purpose, there being four-fifths of the inhabitants of said county against supporting the courts of law until a constitution be formed, and accepted by the people.

"If this our request is rejected, we shall endeavor, by addressing the first Committee of Safety, etc., in this State and others, that there be a state convention formed for the purpose aforesaid. And, if this Honorable Court are for dismemberment, there are other States, which have constitutions, who will, we doubt not, as bad as we are, gladly receive us; and we shall, to the utmost of our ability, support and defend authority and law, as we should, with greater cheerfulness, in the State to which we belong, were there any proper foundation for it.

"We are, with all submission, your Honors' youngest child, and are determined, to the utmost of our power to protect and secure our just inheritance, and hope our parent will graciously concur and assist, by granting this our request.

"And, as in duty bound, will ever pray."

"This appeal tells its own story, and shows a very serious complication of affairs between the State and the county. The General Court gave its earnest attention; in September, appointed a committee to consider 'what was necessary to be done towards a new constitution,' and immediately afterwards sent a deputation to meet the delegates of the Berkshire towns, at Pittsfield, 'inquire into their grievances, and endeavor to remove them,' announcing to them, at the same time, the measures which had just been taken in regard to granting their demand for a constitution, and assuring them that the committee to whom that matter was referred would report upon it as soon as might be, and that it would be taken up at the next session (p. 362).

"The expectation announced to the people of Berkshire by the legislative committee was realized; and at its next session,—that to which Messrs. Williams and Noble were accredited,—the General Court submitted to the people of the state the question whether they desired to have a new constitution, and, if so, whether they would have it framed by a convention chosen expressly for that duty.

"So sluggish was public sentiment outside of Berkshire and Hampshire on this great matter, that nearly one-third of the towns failed to make any return of their vote; and it was not until May that it was known that a majority had declared for a convention.

"While uncertainty on this point continued to prevail, the day fixed for the new term of the Superior Court at Great Barrington approached; and a county convention

met and adopted an address to the judges, written by Mr. Allen, and giving a brief *résumé* of the previous opposition to the courts, with the reasons which had induced it, showing that those reasons still existed, and closing as follows:

*"We are fearful of the consequences, should the operation of the law take place upon the present foundation, especially if it should be attempted to be enforced by violence, as some have insinuated; which insinuations we hope will appear to be groundless, as they have very much exasperated the people. We must, therefore, in duty to ourselves, our country, and our constituents, earnestly desire that your Honors would desist from attempting to sit in this county, until the explicit voice of the great majority of the free men of this State may be taken, by yeas and nays, respecting the validity of the present form of government, by whose determination, when explicitly and regularly known, we are determined cheerfully and religiously to abide."*

"Thus, again and finally, did the men of Berkshire rest the defence of their course—where they had first placed, and ever consistently maintained it—upon the absolute invalidity of government based on no explicit consent of the governed; . . . (pp. 364, 365).

"Soon after these proceedings, it was ascertained that the voters of the State had decided for a convention; and it was called to meet on the first of the following September at Cambridge.

"Pittsfield had voted unanimously that it wished, *not only a constitution, but a bill of rights* 'and that as soon as might be.' It now chose Col. William Williams delegate to the convention, with the following committee of instruction: Valentine Rathbun, Thomas Allen, Eli Root, James Noble, and Lebbeus Backus.

"Their report, prepared by Mr. Allen, . . . offers a fitting culmination to the series whose introduction here has been deemed essential.

"It must be remembered, in reading it, that the maxims laid down were not, in 1779, the accepted truths which most of them have become to latter generations; for although some of them had already been incorporated into the new frames of government in Vermont, Virginia, and New York, and most of them had been more or less distinctly proclaimed by political writers, the sanctity which time has conferred upon them as well-defined propositions, integral parts of the Constitutions of Massachusetts and of the American Union, was yet to be attained. So that, while of course no claim to origination can be raised for this declaration of what Pittsfield desired to secure in the instrument which had so long been the star of her hope, no little political sagacity, and right-mindedness must be inferred from the selection, out of the abounding dross, of so much which the test of experience has proved pure gold" (pp. 365, 366).

These instructions are too long to quote in full, but they contained, as already indicated, most of the ideas which were subsequently adopted in the Bill of Rights and, among others, the following passages:

*"That no man's property of right can be taken from him without his consent, given either in person or by his representative; that no laws are obligatory on the people but those that have obtained a like consent, nor are such laws of any force, if, proceeding from a corrupt majority of the legislature, they are incompatible with the fundamental principles of government, and tend to subvert it. . .*

*"On the whole, we empower you to act agreeable to the dictates of your own judgment after you have heard all of the reasonings upon the various subjects of discussion, having an invariable respect to the true liberty and real happiness of this State throughout all generations, any instructions herein contained to the contrary notwithstanding."*

THOMAS ALLEN,  
ELI ROOT,  
JAMES NOBLE,  
LEBBEUS BACKUS,  
Committee.

"Accepted. Attest:

ELI ROOT, Moderator" (p. 366, 367).

"We have few means of ascertaining what influence the town, by its action, had in securing the provisions

which it desired, and which were finally placed in the Constitution. . .

"Mr. Allen was . . . cognizant of the position of affairs in the convention as well as of the names of the committee . . . and it is hardly conceivable that neither he nor Col. Williams, nervously anxious as both were upon the subject, placed, at least, the substance of the town's instructions in the hands of the committee, or of John Adams, who was commissioned by his associates to prepare the first draft of their work."

James Harris of Lanesborough and Capt. William Walker of Lenox, two other constitutionalists above mentioned, were delegates and members of the committee to draft the constitution.

"The Bill of Rights and Constitution prepared by the convention were established by the people in May, 1780.

"The vote of Pittsfield in its favor was apparently unopposed and unanimous . . . although some of the provisions which it contained were at variance with the preconceived notions of its people" (pp. 369, 370).

The words in the Pittsfield instructions, "Nor are such laws of any force, if . . . they are incompatible with the fundamental principles of government, and tend to subvert it," as well as several passages in the earlier documents quoted, contain the whole doctrine of American Constitutional law, as it had been suggested by James Otis in arguing against the Writs of Assistance and as it was enunciated by John Marshall, twenty-three years later in *Marbury v. Madison*. The word "corrupt" in the passage referred to is obviously not used in a narrow sense. It is used in the general sense of legislators who, whatever their motives, failed to understand or follow out justly the fundamental constitutional principles. Those clear-headed Berkshire men knew that a mistaken saint may do as much damage as a deliberate sinner, and they knew the great variety of men between those two extremes. They knew the importance of high constitutional standards for all kinds of men.

The last paragraph directing Colonel Williams, the delegate to the Convention, "to act agreeable to the dictates of your own judgment after you have heard all the reasonings upon the various subjects of discussion, having an invariable respect to the true liberty and real happiness of this State throughout all generations, any instructions herein contained to the contrary notwithstanding," is of peculiar significance in these days. It shows that these representatives of Berkshire, who did so much to establish constitutional government in Massachusetts, did not believe that it was in the interest of genuine democracy or sound government for a delegate to a deliberative body, which was to represent and advise all of the people to pledge himself irrevocably in advance not to learn anything from the discussion, either for himself or on behalf of his constituents, and not to exercise his best judgment in the interests of all, even if it was contrary, upon due consideration, to the instructions based on insufficient information or consideration of the group which elected him.

The leader and his associates of the band of men who stood for the principles of constitutional government in this way deserve more recognition and appreciation from the people of the state and of the nation than they have thus far received. As indicated in one of the passages in italics, these shrewd Berkshire men had even threatened to open negotiations to join New York if they did not get a constitution in Massachusetts. Concord and other towns joined the movement against the inertia of Boston and after the futile attempt of the legislature to frame a constitution, the Conven-

tion of 1779 was called and appointed a committee of thirty, which, in turn, appointed a sub-committee, consisting of John Adams, Samuel Adams and James Bowdoin, to draft a bill of rights and a frame of government. The subcommittee delegated the task, as usual in a crisis, to John Adams, who had been the intellectual leader of Massachusetts for ten years or more.

Adams approached the task, not only as the best-informed man in the history of government, but, having before him the Berkshire situation and the "Essex Result,"<sup>8</sup> which had largely contributed to the defeat of the badly drawn constitution submitted by the legislature in 1778. The original draft prepared by him and Samuel Adams and James Bowdoin and submitted with some changes by the whole committee of thirty to the convention, appears in the fourth volume of his "Works" (pp. 213-267). With some, but relatively few further changes, that draft was submitted by the convention to the people of the towns and ratified by votes of the town meetings in 1780. It was the first state constitution thus submitted to the people.

The eighteenth article of the "Bill of Rights" reads as follows:

"A frequent recurrence to the fundamental principles of constitution . . . is absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth."

The phraseology of this article is typical both of the eighteenth century and of John Adams in particular, and it is probably considered today by most of the few people, whether lawyers, laymen or historians, who read the constitution as a mere sample of eighteenth-century "hot air." But John Adams, with all his peculiarities whether temperamental or otherwise, was a very practical man when he was thinking about government and particularly when he was drafting an instrument of government in a crisis. It was because his contemporaries realized this that they turned to him for constructive guidance in almost every crisis of the time. He realized that in the long run there was some practical value in the brief and suggestive statement of ideas about government by way of explanation of the framework of a state to be constructed on those ideas. This is the secret of his continuing influence. This, of course, is the purpose of a bill of rights, the absence of which almost wrecked the movement to ratify the Constitution of the United States, and this is the secret of the continued influence of the twenty-ninth and thirtieth articles of our Bill of Rights throughout the country, the twenty-ninth explaining the reason for an independent judiciary and the thirtieth stating the principle of the separation of the legislative, executive and judicial functions in government. This principle of the division of functions, however much it may be criticised if too strictly interpreted, seems fundamentally sound,

not merely, as Bluntchi has said, because "it is involved in all specialization," but because it corresponds to the division of functions performed by the mind of a normal individual.

The eighteenth article which I have quoted was inserted obviously for the deliberate purpose of helping to counteract, in the long run, what the late James C. Carter, more than a century later, referred to as, "the under-estimate of the importance of theoretical inquiry." Adams and his associates in the convention realized that the reasons underlying constitutional provisions would be forgotten unless people were reminded to think about them. They hoped that the language of the eighteenth article would stimulate somebody to think about them and to make others think about them. The practical importance of the "recurrence to fundamental principles," referred to in the eighteenth article, and to "theoretical inquiry," referred to by Mr. Carter, often lies in what may appear to be minor details of phraseology, either in constitutions or statutes, but which, in reality, are examples of "adequate brevity." The last sentence of this eighteenth article contains an example of this of great historical and practical importance. It is common for lawyers and some historians to talk about the function of the court in passing upon the constitutionality of legislation as if it were a "usurped" function, which was not only not expressed, but not implied, in the original constitutions; but it was expressed in Massachusetts.

Article VI of Chapter VI of the Massachusetts Constitution of 1780 provides:

"All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."

That is obviously a statement of dominant law to be applied by courts.

Article XI of the same chapter provides:

"This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land; and printed copies thereof shall be prefixed to the book containing the laws of this commonwealth, in all future editions of the said laws."

The simple and unquestionable meaning of this "adequately brief" language, which could hardly be more clearly expressed, is that the constitution is part of the law to be printed continually with the other laws at the beginning of every edition so that the courts should be expected to read it first and apply it. As we shall see presently, the Massachusetts court so applied it.

When we turn back to the eighteenth article of the Bill of Rights, we find the same idea clearly expressed with emphasis. That sentence reads:

"The people ought consequently to have a particular attention to all those principles, in the choice of their officers and representatives; and they have a right to require of their law-givers and magistrates an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth."

With that sentence expressly applying to "magistrates," in the Bill of Rights, followed in the "Frame of Government" by the two articles previously quoted, and supplemented by the twenty-ninth and thirtieth articles of the Bill of Rights as to the administration of a government of laws "interpreted and administered" by "judges as free, impartial and independent as the lot of humanity will admit," I challenge any man to say

8. The "Essex Result" adopted by a convention of delegates from towns in Essex County which met at Ipswich on April 29th, 1778, was largely the work of Theophilus Parsons, subsequently the leader in the convention of 1788 which ratified the Federal Constitution, and still later chief justice of Massachusetts from 1806-1813. It is printed as an appendix to the "Memoir" of Parsons by his son. For an appreciation of Parsons by the late John G. Milburn of New York after reading this book, see *Mass. Law Quart.* for May, 1930, p. 46; cf. for a brief account of Parsons as the first modern administrator of justice in Massachusetts, *Mass. Law Quart.* for May, 1917, pp. 519-541.

that in Massachusetts, at least, the constitution did not expressly and emphatically impose on the courts the judicial duty of passing on the validity of legislation.<sup>9</sup>

The constitution went into effect in October, 1780. In 1781, Nathaniel Jennison was indicted for an assault on Quock Walker. The defendant justified his assault on the ground that Walker was his slave. The case was tried in 1783 before the whole court, consisting of Chief Justice Cushing, and Justices Nathaniel P. Sargent, David Sewall, and Increase Sumner. The following extract from the original notebook of Chief Justice Cushing was read before the Massachusetts Historical Society on April 16, 1874, by Chief Justice Horace Gray:

*FROM THE CHARGE OF THE CHIEF JUSTICE.*  
 "... As to the doctrine of slavery . . . that (it is true) has been heretofore countenanced by the Province Laws formerly, but nowhere is it expressly enacted or established. It has been a usage—a usage which took its origin from the practice of some of the European nations, and the regulations of British government respecting the then Colonies, for the benefit of trade and wealth. But whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind . . . And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract.

*'Verdict Guilty.'*"

In a note prepared by Chief Justice Gray it appears also that two civil actions had been brought in 1781 concerning this same man, Quock Walker, one an action of trespass by Walker against Jennison for assault in which Walker obtained a verdict for fifty pounds damages, from which the defendant Jennison appealed to the September term, 1781, of the Supreme Judicial Court, but there defaulted so that the judgment below was affirmed. The second civil action was trespass on the case brought by Jennison against John and Seth Caldwell for unlawfully soliciting and seducing Walker from the business and service of Jennison and for hindering and preventing him in reclaiming his said servant. The Caldwells pleaded not guilty. The case was tried before a jury in the court of Common Pleas where Jennison obtained a verdict and judgment for twenty-five pounds. The defendants Caldwell appealed to the September term, 1781, of the Supreme Judicial Court and the case was tried before the court, consisting of Justices Nathaniel P. Sargent, David Sewall, and James Sullivan<sup>10</sup> (the Chief Justice being absent).

Upon the trial the defendants were found not guilty so that Jennison lost his judgment below.

Chief Justice Gray concludes his study as follows:

"The reasonable conclusion seems to be that the

9. Today, we have the additional express provision in the initiative and referendum amendment which extends the judicial function in regard to legislation by the General Court to legislation under the initiative and referendum, by the sentence in the 48th Amendment which reads:

"The limitations on the legislative power of the General Court in the constitution shall extend to the legislative power of the people as exercised hereunder."

10. Judge Sullivan resigned in 1782 and was succeeded by Judge Sumner who sat at the trial in 1783.

doctrine that slavery was abolished in this Commonwealth by the Declaration of Rights was declared in 1781 by the three associate justices in the absence of the Chief Justice, upon the trial of the civil action brought by Jennison against the Caldwells, but not being universally assented to throughout the State, the indictment of Jennison was brought to trial in 1783 before the whole court, and the same doctrine being then distinctly affirmed by the chief justice and the jury instructed accordingly, was thereby conclusively established as the law of the commonwealth."

These decisions were referred to as "judicial legislation" by Mr. George H. Moore, Librarian of the New York Historical Society, in 1866 in his "Notes on the History of Slavery in Massachusetts." He questioned the interpretation placed upon the bill of rights and quoted contemporary newspaper advertisements of slave sales which were published during sittings of the convention in 1780 and for some time thereafter, but those advertisements and sales and the fact that the cases decided arose in Berkshire County and that there were other such cases in that county emphasizes the obvious meaning of the first article of the bill of rights, which was applied by the court as already stated. That article reads in full as follows:

"Article I. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

All the judges who heard these cases had been members of the constitutional convention. The Pittsfield instructions to their delegate to the convention contained the clause that, "no man can be deprived of liberty and subjected to perpetual bondage and servitude unless he has forfeited his liberty as a malefactor." In a statement in 1795 printed in the fourth volume of the Massachusetts Historical Society Collections, Dr. Jeremy Belknap, the founder of that society, said,

"The first article of the declaration of rights . . . was inserted not merely as a moral or political truth, but with a particular view to establish the liberation of the negroes on a general principle, and it was so understood by the people at large."

In 1786, the Supreme Judicial Court declared inoperative, apparently because of the treaty with Great Britain, the resolves of 1784 and 1785 providing that in suits brought by absentees during the Revolutionary War to recover debts, judgment for all interest accruing during the war should be suspended until further action of the legislature.<sup>11</sup>

In 1799 occurred what appears to be the first recorded direct application, by any court, of the Constitution of the United States to a state statute. The Massachusetts Supreme Court, while Francis Dana was chief justice, in the case of *Derby v. Blake*, refused to recognize a statute of Georgia which purported to repeal a grant of lands in that state. The case (which is referred to in a note to Warren's "History of the American Bar," p. 270) is reported quite fully in the "Columbian Centinel" of October 9, 1799 (a Boston newspaper). The full report is reprinted in the supplement to Volume 226 of the Massachusetts Reports (pp. 618-625).

The portion of the opinion relating to this question is reported as follows:

"It was also decidedly the opinion of the Court, that  
 (Continued on page 210)

11. See A. C. Goodell's study of *Brattle v. Hinckley* and *Brattle v. Putnam*, 7 Harv. Law Rev., 45. These cases appear to explain Cutting's letter to Jefferson, referred to in Bancroft's History, which has puzzled some men.

# THE HOUSE OF DELEGATES OF THE LEGAL PROFESSION

By WILLIAM L. RANSOM

*President of the American Bar Association*

THE pending plan for an improved organization of the American Bar will create a truly representative House of Delegates of the legal profession throughout the United States. That is the central feature and chief accomplishment of the plan which will be voted on in Boston on August 24th. Within a year or two at most, the honor most sought and prized by American lawyers, and most commonly attested by the public as recognition of high standing and attainments, will be that of membership in the House of Delegates of the legal profession.

It will be conceded that the actual powers and usefulness of the Assembly (the members of the Association who attend its conventions) will be increased, under the proposal (Article IV); and the sessions of the Assembly will be made much more interesting and significant, through eliminating the routine reading of reports (Article IX, Sec. 4) and making possible the reasoned discussion of matters of real interest to those present (Article IV, Sec. 2). Nevertheless, the outstanding advance which will follow a favorable vote on the plan is the creation, for the first time, of a National representative body, most democratically chosen, to bring together in one assemblage the delegates of a substantial majority of American lawyers and of practically every angle and aspect of the legal profession. The potentialities of such a forward step could hardly be over-estimated.

## Compare the Pending Plan With the Structure Now in Effect

The most obvious test of the desirability of the adoption of the pending plan for federation will be found in comparing it with the present Constitution and By-laws of the Association, as printed in the Annual Report volume recently distributed. The new provisions are strikingly confirmed by such a reading and comparison.

No one has yet been heard to claim that the plan as now pending is not a great gain over what is now in force. In concept and in draftsmanship, the improvement is conclusively shown. The keystone of the advance is the House of Delegates of the legal profession (Article V).

## A National House of Delegates Long Needed

A democratic and deliberative body, truly representative of American lawyers, has long been needed, in the interests of the public as well as of the profession. The casual attendance at convention sessions, from among the 2,000 to 3,000 lawyers who come to the conventions at all, has no sense of right and authority to speak and act for either the Association or the legal profession. National policies of the Association and the profession may be determined by two or three hundred lawyers, as contrasted with the 78,000 in the State Bar Associations and the 28,000 in the American Bar Association. The unrepresentative

structure gives no voice or vote to the 25,000 members at home or to the strong and active State Bar organizations or to the larger local Bar Associations. Only sixteen per cent of American lawyers are members of the American Bar Association, and fewer than two per cent of the American lawyers attend the annual convention. Nation-wide policies and personnel are always under the potential control of the lawyers of the convention city and its locality; truly representative character is lacking; and existing sources of supporting strength and reasoned opinion are not utilized.

Despite all of its attractive atmosphere of friendship and congenial acquaintance, and despite its considerable attendance of able and public-spirited lawyers, the annual convention of the Association is such in structure that it does not command recognition as truly representative of the views and wishes of the average lawyer.

## Putting American Lawyers in Actual Control of Their Profession

What a magnificent body will come into being soon after the adoption of the plan! The members of the House of Delegates will be so democratically chosen, in so many different ways, and will so thoroughly represent all angles and aspects of the legal profession, that the deliberation and decisions of such a body will command respect on account of both its high quality and the numerical preponderance of those from whom its delegates come. Leadership will not be destroyed or impaired, but will be removed from the possibility of group or sectional control and will be kept genuinely responsive to the ascertained views of the profession.

First of all, the members of the Association in each State will be represented by one of their number (Article V, Sec. 4 and 5), nominated and elected by themselves, with every member having the opportunity to take part in choosing his State Delegate. Nomination by petition and election by mail ballot will enable each member of the Association to take a direct part in selecting his representative in the House of Delegates.

As the basic idea of the plan is *federation* of the Bar, there will appropriately be in the new House, as its most numerous element, the State Bar Association Delegates, at least one from each State but not more than four from any State (Article V, Sec. 6), chosen by each State Bar organization in such manner as it sees fit. In the States in which there are one or more large and robust local Bar Associations of prescribed qualifications, such a local Association may select one Delegate each, in diminution of the number of Delegates otherwise chosen by the State Bar organization, which remains entitled in any event to at least one Delegate (Article V, Sec. 6).

The Assembly will itself nominate and elect, by nominations from the floor, and ballot at the convention, five members to represent in the House of Delegates the members who come to the annual conven-

NOTE: The references to Articles and Sections are to the Plan as published in the February issue of the JOURNAL and as available also in pamphlet form.

tion. (Article IV, Sec. 3.) From this source is likely to come a delegation of active and influential members of the House.

Membership organizations in the legal profession, such as the American Law Institute and the American Judicature Society, may be admitted to affiliation and to representation by one member of the House of Delegates (Article V, Sec. 7).

#### Representation of all Angles of the Legal Profession

The representative character of the House will be further assured by the *ex officio* inclusion of the head of each of several useful organizations sponsored by the American Bar Association (Article V, Sec. 3); i. e.

The President of the National Conference of Commissioners on Uniform State Laws;

The Chairman of the National Conference of Bar Examiners;

The Chairman of the National Conference of Judicial Councils;

The President of the Association of American Law Schools; and

The Chairman of each Section of the Association, including the Junior Bar Section, so as thoroughly to coordinate the Sections into the work of the Association; the Section chairman being nominated and elected by the Section members at the meeting.

The general officers of the Association and the members of the Board of Governors, chosen one from each Federal Judicial Circuit, will also be *ex officio* members of the House of Delegates (Article V, Sec. 3). The Chairmen of Standing and Special Committees of the Association will have the privileges of the floor (Article V, Sec. 11), but no vote in the House, as that would enable the President to appoint about one-fourth of the members of the House.

All members of the House of Delegates, in any capacity, have to be members of the American Bar Association (Article V, Sec. 3). The administrative body (the Board of Governors) becomes a responsible committee of the House of Delegates, in all respects subject to control by the House (Article VI, Sec. 4); and, after 1936, the elected members of the Board of Governors have to be members of the House of Delegates at the time of their election (Article VIII, Sec. 3).

Some have asked whether the President of the National Association of Attorneys-General, and the Attorney-General and Solicitor-General of the United States, should be made members of the National House of Delegates. This has been carefully canvassed by several representative groups, and in each instance the answer has been in the affirmative. If we are to create a truly representative body of the legal profession, we should make it inclusive and give it a chance to be both representative and effective.

The legal profession in America is not made up solely of attorneys for private clients. Many of the problems of the profession are dealt with by lawyers in public office. If we want to bring together, into one House, all angles and aspects of the present-day legal profession, so that its deliberations and decisions will command respect, "the public side" should and must be represented. The President of the National Association of Attorneys-General will represent the law officers of the forty-eight States. The Attorney-General and the Solicitor-General of the United States are the titular heads of the legal profession. Practically without exception since 1878, they have been actively interested in the organized Bar. Their inclusion is as-

surance of the broad and representative base for the structure we are building.

#### Practical Compromises Inherent in Plan

Like every document which is related to actualities rather than theories, the pending plan embodies some compromises dictated by the existent conditions. Theoretically, it would probably be preferable that the House of Delegates should federate the State Bar organizations and that even the larger local Bar Associations should not be given direct representation in the National federation. This would be practicable if in each State the local Bar Associations were federated in the State Bar organization. That is not the case; and there are nearly a dozen States in which large, active local Bar Associations do much of the effective work of the organized Bar.

The House of Delegates needs the participation of these large local Associations, and the plan provides for it, in such a way as *not* to increase the number of delegates from a State (Article V, Sec. 6). I do not think that the pending draft contains the soundest and final form of definition as to the representation of local Bar Associations. The desirable formula has been difficult to evolve, because of the great variety of conditions in the States. The objective of limiting duplicate representation of lawyers through local Bar Associations is plain, but the precise and equitable wording is not easy. The formula contained in the present draft is realized by the Committees to be tentative and designed to elicit constructive criticism. Beyond a doubt, it will be clarified and improved, in May, before final submission for the Boston Convention.

Not a few of the local Associations with less than eight hundred members have expressed the hope that they might be represented directly in the National House of Delegates, rather than through their State Bar organization. The line has to be drawn somewhere, perhaps rather arbitrarily but in the light of the actual conditions, in order to preserve the great objective of a truly representative House of Delegates not too large and unwieldy to function effectively and to meet more than once a year. It would be unsound to go far in giving local Bar Associations one delegate, the same as a whole State.

Probably an ideal House of Delegates would have about 125 members. More than 175 members would be too many. The pending plan is likely to produce a House of about 150 delegates or a few more as affiliated organizations are admitted (Article V, Sec. 7).

The new Section of Bar Organization will succeed the historic Conference of Bar Association Delegates, and will continue to be the forum and clearing-house for National discussion of the problems of local and State Bar organization. The smaller local Bar Associations will continue to be represented in that Section; and the Section of Bar Organization will, in turn, be represented in the House of Delegates.

The chairmanship of the House of Delegates will be one of the outstanding offices in the American Bar Association and the legal profession. The chairman of the representative body will be in a position to exercise great leadership and vision, especially during the formative years, in making the House a body which fulfills the hopes and aspirations of American lawyers.

#### Summary

The pending plan federates, through representatives of their own choosing, the organized Bar of the States and the American Bar Association members

in the States. It coordinates completely the work of the American Bar Association within itself, by establishing liaison between all officers, Sections and Committees, now so little correlated. It places the power to determine the policies of the National Bar in the hands of the *Delegates chosen by and in the respective States*, subject always to referendum (Article V, Sec. 10; Article IV, Sec. 2) to the whole membership of the American Bar Association or of the American Bar Association and State and participating local Bar

Associations. Every function and every step in the process of nominating and electing officers and members of the Board of Governors is kept in the hands of members of the American Bar Association, but the members at home and the respective States are given controlling voice and vote.

In my next article, I shall discuss the democratic features of the plan, in contrast to the structure now in effect, and show what the plan offers to the average practising lawyer.

## HOW TO SUBPOENA A MACHINE INTO COURT

By F. O. RICHEY

*Member of the Cleveland, O., Bar*

**I**N patent litigation it often becomes more important to bring a machine into Court than to bring in books, papers, or documents. There seems to be a somewhat common misunderstanding that a subpoena duces tecum can bring in the machine. This misunderstanding seems to be held by Courts as well as by counsel, so that subpoenas duces tecum are frequently issued for machines.

The first effort of record seems to have been made in the case of *In re Shepard*, 3 Fed. 12 where application was made for an attachment against a witness who had declined to bring in "patterns" for a stove in response to a subpoena duces tecum. The writ had issued from the Clerk's office, but the Court, on considering the matter, discovered that the writ had been improperly issued since the "patterns" for the stove, being a machine, were beyond the scope of the subpoena duces tecum and the power of the Court to produce with subpoena.

In *Johnson Steel Street Rail Co. v. Northern Branch Steel Company*, 48 Fed. 191, the subpoena duces tecum directed the production of both drawings and templates. The witness refused to produce them. The Court ordered him to produce the drawings, but not the templates, thereby sharply drawing the line between the authority and the lack of authority in the premises of the subpoena duces tecum.

In *Fisher v. Automobile Supply Manufacturing Co.*, 199 Fed. 191 the doctrine was extended, even in the face of special statutes on the subject, to a case where one party demanded that the other party to the cause bring in a machine.

To our knowledge there have been only two cases in which this rule has been avoided, and therefore we know of only these two ways to get the machine in by subpoena.

The first is the case of *Raynar vs. Evans*, 83 Fed. 696 involving a patent for a "tooth crown cap". The defendant set up a prior use and discovered one of the prior use "tooth crown caps" in the mouth of a man who was called as a witness. It was integral with the witness, so to speak, and when the witness was brought into Court the machine, ipso facto, came along. The "tooth crown" was duly offered in evidence while in the mouth of the witness and then apparently there arose considerable discussion as to the proper custody of the exhibit after the witness was discharged. It was contended by the plaintiff that it should remain in the custody of the Clerk to which the witness, of course, objected. Indeed, he was even unreasonable enough to object to having an exhibit tag tied on his

tooth. Nor was he willing to have his tooth extracted so that it might be left in the Clerk's custody. The Court seems to have settled the question by allowing the exhibit to remain in the possession of the witness "so long", said the Court, "at least, as he continued to be 'a going concern'."

The other case in which this rule was avoided to our knowledge is not reported. It was also a patent case. The patent involved was on a rubber heel. It was discovered that the Clerk of the Court was wearing a pair of prior art rubber heels and he was called to testify. After identifying the heels, the heels and his shoes were offered in evidence while on his feet. The question arose as to whether the party calling him had a right to place his shoes in evidence even after the witness and the shoes were in the courtroom. By way of anticipating the question of custody the party calling him maintained that since the shoes were the Clerk's and on the Clerk's feet, the exhibits might well and properly remain in the custody of the Clerk as exhibits. But the Clerk contended that he might wish to wear other shoes, or might wear out the exhibits unless he did change. The Judge finally decided both questions by announcing that he would not receive the Clerk's shoes in evidence except, and until after, the party offering them bought the Clerk a new pair of shoes, which was done, and after the substitution, the shoes with the prior art rubber heels on them were reoffered and received in evidence. They went up to the Supreme Court of the United States as exhibits in the case of *I. T. S. vs. Essex*, 272 U. S. 429.

Where a subpoena duces tecum for a machine is issued without authority, and the witness wishes to stand on his rights or to keep his machine, apparently the best practice has been for the witness to bring in the machine concealed and nailed up in a box, if the machine is small enough to be put into a box and brought in, and then when the machine is called for, the witness raises the objection, preferably through his own counsel. He is then not in contempt for failing to comply with the subpoena duces tecum. Where, of course, the machine is too large, the only thing that can be done is to appear without the machine through his own counsel, make the objection, and then throw himself upon the mercy of the Court, as was done in the *Shepard* and *Johnson* causes.

Manifestly the rule, though it causes much inconvenience at times, is the only sensible rule in the premises because a witness cannot be required to bring in his watch or his steam shovel or his printing press. It seems to be one of those cases where there must be a balancing of the conveniences and the inconveniences.

## AMERICAN BAR ASSOCIATION JOURNAL

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### THE TVA DECISION

It is a wonderful tribute to the promptness with which the Supreme Court of the United States has been deciding great constitutional questions, that an interval of fifty-nine days between the date of oral argument and the date of the announcement of the judgment of the Court in the Tennessee Valley Authority case set the press guessing at the cause of the "unusual delay."

Those who, on February seventeenth, were in the beautiful new court room of the stately white marble temple at the seat of government, dedicated to "Equal Justice under Law," will not soon forget the occasion.

Was it by accident that, before pronouncing the judgment for which every person in the crowded court room was waiting, the Chief Justice read the opinion which reversed the death sentence pronounced against four Mississippi negroes on a conviction of murder, because the verdict rested on a confession of guilt extracted from the accused by duress?

Even if not intended, it was a demonstration that the greatest court of the land would not deny or delay the protection of the shield of justice to the most obscure and miserable citizen whose right to due process of law had been disregarded.

It seemed to some who had come to the court room with the hope of being present when a great historic opinion was pronounced, that they were again to be disappointed, but when the Chief Justice was heard to announce the title of the next case, *Ashwander v. Tennessee Valley Authority*, one could sense a unanimous feeling of satisfaction. The audience leaned forward to

get every word, for though the voice of the Chief Justice was clear and commanding, the acoustic properties of the court room leave much to be desired.

After briefly stating the facts and the course of the case through the lower courts, the Chief Justice first dealt with the right of plaintiffs, owners of preferred stock of the Alabama Power Company, to bring suit to set aside the contract between that company and the Tennessee Valley Authority "as injurious to the interests of the corporation and as an illegal transaction,—violating the fundamental law." That right was upheld, the Court stating that "while their stock holdings are small, they have a real interest and there is no question that the suit was brought in good faith."

Strangely enough and not forecast by any of the journalistic prophets, this point of the right to sue was the one on which the court was divided, five to four. Mr. Justice Brandeis, in his concurring opinion, said that he did not dissent from the conclusion of the Chief Justice on the constitutional question, but that he concurred in the result because of his view that preferred stockholders who proved no danger of irreparable injury ought not to be allowed to challenge acts of corporate officers involving the exercise of judgment and discretion, as to which no charge of fraud or bad faith, seriously threatening their property rights, was made.

Mr. Justice Stone, Mr. Justice Roberts and Mr. Justice Cardozo concurred in the opinion of Mr. Justice Brandeis, while Mr. Justice Van Devanter, Mr. Justice Sutherland, Mr. Justice Butler and, on this point, Mr. Justice McReynolds, concurred with the Chief Justice.

On the constitutional question involved there was almost unanimous agreement—a particularly fortunate circumstance as far as the effect on public opinion is concerned. And the public may well note, what is of course familiar to the profession, the Court's traditionally scrupulous adherence to the precise justiciable issue involved, its refusal to go into questions of congressional policy not affecting the exact legal issue, and of course its indulgence in the familiar presumption of the constitutionality of Acts of Congress—a presumption which nothing but clear proof of unconstitutionality can overcome. Such evidence of the way the Court acts, of the wise restraints it imposes on itself, should convince everyone that no restriction on the exercise of the powers entrusted to it by the constitution is needed.

The opinion of the Court, sustaining the right of the TVA to make the contract involved in the case, is reviewed elsewhere in this issue. Its clarity could not be excelled. But in spite of this, the opinion is already being so enlarged on the one hand and minimized on the other by those whose conflicting interests, personal or political, give them an emotional attitude toward this notable pronouncement, that it seems here proper to emphasize the carefully guarded restriction of the decision to a few simple points. These are carefully set forth in the opinion itself and are reproduced in the review.

The only dissent was that of Mr. Justice McReynolds. On the question of the constitutional power of the United States to build the Wilson Dam, by proper means and for legitimate ends, and to dispose of the power there generated as property of the United States, he did not dissent. But he declined to restrict his examination of the case within the limits by which his brethren had circumscribed the issue, and based his departure from the others on the proposition that, under the guise of exercise of lawful constitutional powers to dispose of property, the government was in fact attempting to enter into commercial activities with the definite design of accomplishing ends outside the sphere marked out by the Constitution.

We quote elsewhere, with other parts of his opinion, his closing paragraph, which probably better than any other one single portion of his dissent epitomizes his view of the real case as he sees it.

#### COOPERATION BETWEEN THE PRESS, RADIO, AND BAR

One of the most significant and encouraging events of this forward-looking year is the action of the American Newspaper Publishers' Association and the American Society of Newspaper Editors, in appointing special committees of their profession, for the purpose of cooperating with a special committee of the American Bar Association.

That representative editors and publishers are willing to meet and work with lawyers in a common effort to accomplish results which are deemed to concern the two professions and to be important in the public interest, is in itself a most favorable development, even aside from the gravity of the matters to be discussed. No such tripartite group has hitherto been constituted; and the addition of representatives of radio

organizations and the public will enhance its significance as a step forward in public relations.

Mr. Newton D. Baker and his associates, constituting the representatives of the American Bar, have indeed a fortunate opportunity to aid in the development of standards of publicity, in connection with the trial of judicial and quasi-judicial proceedings, that will find acceptance as a consensus of fair opinion. Members of the Bar should be ready and eager to put their own house in order, through faithful conformance to proper standards.

#### GEORGE W. WICKERSHAM

Mr. Wickersham died suddenly in New York City on January 25. His death was a shock to his friends and acquaintances and a great loss to his profession and his country. He had been a long and distinguished career, notable not only for professional success but for its continuing evidence of his unselfish devotion to the public good.

On being told of his death, John W. Davis paid him this tribute, in which all who knew him will heartily join: "He was one of the most useful public servants and wholly admirable men I have ever known." And Elihu Root said of him, "He was very able, very experienced in public affairs, unselfishly devoted to the public good, and with a nobility of character and personal charm that made him immensely effective in the many good causes in which he was active."

The Council of the American Law Institute at its recent meeting adopted a resolution in which it said, in part:

"To him we must attribute a signal part in the attainment of the position now held by the Institute in the estimation both of the public and the legal profession. The friend of all of us, the intimate companion of many of us, it is impossible adequately to express our sense of loss sustained in the death of one who was both a devoted servant of the public and a charming and lovable gentleman."

Of his leading position in the profession, so long acknowledged as to be a commonplace, it is not necessary to speak. The details of his admirable career will be given elsewhere by those more fitted to set them forth. Here we only call attention to the outstanding fact that the tributes evoked by his death dwell mainly on the nobility of his character and the unselfishness of his labors. He gave much to others and it may be truly said of him, in death as in life, "What I gave, I have."

## REVIEW OF RECENT SUPREME COURT DECISIONS

Right of Tennessee Valley Authority to Sell Surplus Electrical Energy Generated at Wilson Dam Upheld—This Dam Was Constructed by the United States in the Exercise of Its War Powers and Power to Improve Navigable Waters, and the Power There Generated Is Property of Which Government Has Constitutional Right to Dispose by Appropriate Means, Such as Purchase of Transmission Lines to Convey It to Favorable Market  
—Preferred Stockholders of Power Company Which Agreed to Sell Such Lines Have Standing to Challenge Validity of Act Purporting to Authorize Contract  
—Four Justices Express View That Plaintiff Had Not Requisite Interest, but Concur in Conclusion on Constitutional Question—Tax Based on Excessive Assessment Held to Violate Due Process—Freedom of Press

By EDGAR BRONSON TOLMAN\*

### Tennessee Valley Authority—Power to Sell Surplus Electrical Energy and to Purchase Transmission Lines—Standing of Corporate Stockholders to Challenge Validity of TVA Act

Preferred stockholders of a power company, which has agreed to sell part of its transmission lines and real estate to the Tennessee Valley Authority and to purchase electrical energy from the Authority, have standing to challenge the constitutional validity of the Act purporting to empower the Authority so to contract.

The Wilson Dam was lawfully constructed by the United States in the exercise of its war powers and the power to improve navigable waters. Electricity generated by the fall of water at such a dam is property of the United States. Congress has constitutional power to authorize the Tennessee Valley Authority to sell surplus electrical energy thus generated and to purchase lines for the transmission of such energy to the most favorable market.

*Ashwander et al v. Tennessee Valley Authority et al*, 80 Adv. Op. 427; 56, Sup. Ct. Rep. 466.

The decision in this case related to the validity of a contract entered into on January 4, 1934, by the Tennessee Valley Authority and the Alabama Power Company. The contract provided: (1) for the purchase by the Authority from the Power Company of certain transmission lines and auxiliary properties for \$1,000,000; (2) for the purchase of certain real property for \$150,000; (3) for an interchange of hydro-electric energy, and for the sale by the Authority to the Power Company of "surplus power"; and (4) for mutual restrictions as to areas to be served in the sale of power.

The Power Company is an Alabama corporation, engaged in the generation and distribution of electric energy in that State. The transmission lines to be purchased by the Authority extend from Wilson Dam, at the Government's Muscle Shoals plant on the Tennessee River in northern Alabama, into seven counties in the State within a radius of 50 miles. The real property is near the site of the Wheeler Dam.

The suit under review was brought by preferred stockholders of the Power Company, after refusal of their demand on its Board of Directors that the contract be annulled. The plaintiffs contended that the contract was injurious to the corporate interests and that it was invalid because beyond the constitutional

power of the Federal Government. They sought a determination that the contract was illegal, an injunction restraining its performance, and a general declaratory decree with respect to the rights of the Authority.

The defendants, including the Authority, its directors, the Power Company, its mortgage trustee, and municipalities within the area served filed answers. After a hearing, the district court made elaborate findings, and entered a final decree annulling the contract. The Circuit Court of Appeals reversed the decree. On certiorari the Supreme Court, in an opinion by the CHIEF JUSTICE, affirmed the ruling of the circuit court, MR. JUSTICE McREYNOLDS dissenting.

The first question considered was whether the preferred stockholders had a standing and an interest entitling them to bring the suit. The concurring opinion of MR. JUSTICE BRANDEIS denied that the plaintiffs had the requisite interest on which to maintain their suit. The majority of the Court, however, were of the opinion that the preferred stockholders were entitled to raise the issue presented.

In dealing with the question whether the plaintiffs were entitled to maintain the suit, the learned CHIEF JUSTICE first described their interest in the litigation. As to this he said:

"... Plaintiffs sue in the right of the Alabama Power Co. They sought unsuccessfully to have that right asserted by the power company itself, and upon showing their demand and its refusal they complied with the applicable rule. While their stock holdings are small, they have a real interest and there is no question that the suit was brought in good faith. If otherwise entitled, they should not be denied the relief which would be accorded to one who owned more shares.

"Plaintiffs did not simply challenge the contract of January 4, 1934, as improvidently made—as an unwise exercise of the discretion vested in the Board of Directors. They challenged the contract both as injurious to the interests of the corporation and as an illegal transaction—violating the fundamental law. In seeking to prevent the carrying out of the contract, the suit was directed not only against the power company but against the Authority and its directors upon the ground that the latter, under color of the statute, were acting beyond the powers which the Congress could validly confer. In such a case it is not necessary for stockholders—when their corporation refuses to take suitable measures for its protection—to show that the Managing Board or trustees have acted with fraudulent intent or under legal duress.

"To entitle the complainants to equitable relief, in the absence of an adequate legal remedy, it is enough for them

\*Assisted by JAMES L. HOMIRE

to show the breach of trust or duty involved in the injurious and illegal action. Nor is it necessary to show that the transaction was *ultra vires* the corporation. The illegality may be found in the lack of lawful authority on the part of those with whom the corporation is attempting to deal. Thus, the breach of duty may consist in yielding, without appropriate resistance, to governmental demands which are without warrant of law or are in violation of constitutional restrictions. The right of stockholders to seek equitable relief has been recognized when the managing board or trustees of the corporation have refused to take legal measures to resist the collection of taxes or other exactions alleged to be unconstitutional . . . ; or because of the failure to assert the rights and franchises of the corporation against an unwarranted interference through legislative or administrative action . . . . The remedy has been accorded to stockholders of public service corporations with respect to rates alleged to be confiscatory . . . . The fact that the directors in the exercise of their judgment, either because they were disinclined to undertake a burdensome litigation or for other reasons which they regarded as substantial, resolved to comply with the legislative or administrative demands, has not been deemed an adequate ground for denying to the stockholders an opportunity to contest the validity of the governmental requirements to which the directors were submitting . . . ."

Prior decisions of the Court as to the standing of a shareholder to raise constitutional issues were then examined, and reliance had particularly on *Smith v. Kansas City Title Company*, 255 U. S. 180, and *Brushaber v. Union Pacific Railroad Company*, 24 U. S. 1. Concerning these, the following conclusion was stated:

" . . . A close examination of these decisions leads inevitably to the conclusion that they should either be followed or be frankly overruled. We think that they should be followed, and that the opportunity to resort to equity, in the absence of an adequate legal remedy, in order to prevent illegal transactions by those in control of corporate properties, should not be curtailed because of reluctance to decide constitutional questions."

The absence of an adequate remedy at law was also noted as weighing in favor of the right of the plaintiffs to maintain their suit.

Attention was also given to the Government's contention that the Power Company (and hence a stockholder also, suing in its right) is estopped to question the Act creating the Authority. This contention was based on the fact that the Power Company, since 1925, has purchased electric energy at the Wilson Dam, and continued its purchases after the Act of 1933, creating the Authority. To support the claim of estoppel the principle was invoked that one who accepts benefits under a statute cannot be heard to question its constitutional validity. This principle was thought inapplicable for the following reasons:

" . . . The prior purchase of power in the circumstances disclosed may have a bearing upon the question before us, but it is by no means controlling. The contract in suit manifestly has a broader range and we find nothing in the earlier transactions which preclude the contention that this contract goes beyond the constitutional power of the Authority. Reference is also made to a proceeding instituted by the power company to obtain the approval of the contract by the Alabama Public Service Commission and to the delay in the bringing of this suit. It was brought on October 8, 1934, following plaintiffs' demand upon the board of directors in the preceding August. Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities."

"We see no reason for concluding that the delay or the proceeding before the commission caused any prejudice to either the power company or the Authority, so far as the subject matter of the contract between them is con-

cerned, or that there is any basis for the claim of estoppel."

"We think that plaintiffs have made a sufficient showing to entitle them to bring suit and that a constitutional question is properly presented and should be decided."

Discussion of the constitutional issues then followed under the following headings: (1) The scope of the issue; (2) The constitutional authority for the construction of the Wilson Dam; and (3) The constitutional authority to dispose of electric energy generated at the Wilson Dam.

In defining the issues, MR. CHIEF JUSTICE HUGHES emphasized that the question before the Court did not embrace the pronouncements, policies, and program of the Authority and its directors, or their motives or desires. He emphasized also that the plaintiffs have no standing under the declaratory Judgment Act of June 14, 1934, to obtain a declaration of rights as to the powers of the Authority, and added:

"There is a further limitation upon our inquiry. As it appears that the transmission lines in question run from the Wilson Dam and that the electric energy generated at that dam is more than sufficient to supply all the requirements of the contract, the questions that are properly before us relate to the constitutional authority for the construction of the Wilson Dam and for the disposition, as provided in the contract, of the electric energy there generated."

As to the constitutional authority for construction of the Wilson Dam it was observed that the Government's argument recognized the essential limitation that Congress may not "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government." The Government's contention was that the Wilson Dam was constructed, and the power plant connected with it was installed, in the exercise of the war and commerce powers, the national defense and the improvement of navigation. The construction was begun in 1917 under the National Defense Act of 1916. That Act authorized the President to make investigation as to means for producing nitrates and other products for munitions of war, to designate sites on any river, in his opinion necessary to carry out the purposes of the Act. It also authorized the President to construct, maintain and operate dams, locks, improvements to navigation, power houses, and other plants and equipment necessary for the generation of electric power and for the production of nitrate and other products needed for munitions of war.

The international situation in 1916 was the subject of judicial notice, and the Court also accepted the district court's finding that the maintenance of the properties, in the event of war, constitute national defense assets.

The improvement of navigation was also recognized as one of the objects of the Act. As to this, the opinion states:

"The act of 1916 also had in view 'improvements to navigation.' Commerce includes navigation. 'All America understands, and has uniformly understood,' said Chief Justice Marshall in *Gibbons vs. Ogden*, 9 Wheat. 1, 190, 'the word "commerce," to comprehend navigation.' The power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstructions to navigation and to remove such obstructions when they exist. 'For these purposes,' said the court in *Gilman vs. Philadelphia*, 3 Wall. 713, 725, 'Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England. . . .

"The Tennessee River is a navigable stream, although

there are obstructions at various points because of shoals, reefs and rapids. The improvement of navigation on this river has been a matter of national concern for over a century. Recommendation that provision be made for navigation around Muscle Shoals was made by the Secretary of War, John C. Calhoun, in his report transmitted to the Congress by President Monroe in 1824, and, from 1852, the Congress has repeatedly authorized projects to develop navigation on that and other portions of the river, both by open channel improvements and by canalization."

\* \* \*

"While, in its present condition, the Tennessee River is not adequately improved for commercial navigation, and traffic is small, we are not at liberty to conclude either that the river is not susceptible of development as an important waterway, or that Congress has not undertaken that development, or that the construction of the Wilson Dam was not an appropriate means to accomplish a legitimate end."

"The Wilson Dam and its power plant must be taken to have been constructed in the exercise of the constitutional functions of the Federal Government."

The constitutional authority to dispose of the electric energy generated at Wilson Dam was then considered. The Government's acquisition of ownership of the electric energy and its right generally to dispose of its property were thus summarized:

"... The Government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, and the water power, the right to convert it into electric energy, and the electric energy thus produced constitute property belonging to the United States..."

"Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by section 3 of Article IV of the Constitution. This section provides:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

"To the extent that the power of disposition is thus expressly conferred, it is manifest that the tenth amendment is not applicable. And the ninth amendment (which petitioners also invoke) in insuring the maintenance of the rights retained by the people does not withdraw the rights which are expressly granted to the Federal Government. The question is as to the scope of the grant and whether there are inherent limitations which render invalid the disposition of property with which we are now concerned."

"The occasion for the grant was the obvious necessity of making provision for the government of the vast territory acquired by the United States. The power to govern and to dispose of that territory was deemed to be indispensable to the purposes of the cessions made by the States. And yet it was a matter of grave concern because of the fear that 'the sale and disposal' might become 'a source of such immense revenue to the national Government, as to make it independent of and formidable to the people.' Story on the Constitution, secs. 1325, 1326. The grant was made in broad terms, and the power of regulation and disposition was not confined to territory, but extended to 'other property belonging to the United States,' so that the power may be applied, as Story says 'to the due regulation of all other personal and real property rightfully belonging to the United States.' And so, he adds, 'it has been constantly understood and acted upon.'"

The long continued practice of disposing of lands and minerals by lease and the early recognition of the full power of disposal were noted. In the light of these, enquiry was made as to whether a more limited

power of disposal should be allowed as to water power, convertible into electric energy.

"... If so, it must be by reason either of (1) the nature of the particular property, or (2) the character of the 'surplus' disposed of, or (3) the manner of disposition."

Nothing was found in the nature of the property to require a limitation on the power of disposal.

"That the water power and the electric energy generated at the dam are susceptible of disposition as property belonging to the United States is well established."

Cases dealing with power rights as property were cited in support of this conclusion.

The contention next considered was that the surplus which may be disposed of is that necessarily created in the course of making munitions or operating for navigation. This contention was rejected:

"The argument is stressed that, assuming that electric energy generated at the dam belongs to the United States, the Congress has authority to dispose of this energy only to the extent that it is a surplus necessarily created in the course of making munitions of war or operating the works for navigation purposes; that is, that the remainder of the available energy must be lost or go to waste. We find nothing in the Constitution which imposes such a limitation. It is not to be deduced from the mere fact that the electric energy is only potentially available until the generators are operated. The Government has no less right to the energy thus available by letting the water course over its turbines than it has to use the appropriate processes to reduce to possession other property within its control, as, for example, oil which it may recover from a pool beneath its lands, and which is reduced to possession by boring oil wells and otherwise might escape its grasp."

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"We think that the same principle is applicable to electric energy. The argument pressed upon us leads to absurd consequences in the denial, despite the broad terms of the constitutional provision, of a power of disposal which the public interest may imperatively require."

The method of disposing of the surplus was then adverted to. The constitutional provision is silent as to the method of disposal. It was recognized, however, that the method must be an appropriate means of disposition according to the nature of the property, that it must be one adopted in the public interest as distinguished from private or personal ends, and that it must be consistent with the powers reserved to the States.

In regard to the particular method of disposition here in question, no objection was found. With reference to this, the opinion states:

"As to the mere sale of surplus energy, nothing need be added to what we have said as to the constitutional authority to dispose. The Government could lease or sell and fix the terms. Sales of surplus energy to the power company by the authority continued a practice begun by the Government several years before. The contemplated interchange of energy is a form of disposition and presents no questions which are essentially different from those that are pertinent to sales."

"The transmission lines which the authority undertakes to purchase from the power company lead from the Wilson Dam to a large area within about 50 miles of the dam. These lines provide the means of distributing the electric energy, generated at the dam, to a large population. They furnish a method of reaching a market. The alternative method is to sell the surplus energy at the dam, and the market there appears to be limited to one purchaser, the Alabama Power Co., and its affiliated interests. We know of no constitutional ground upon which the Federal Government can be denied the right to seek a wider market."

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"... Certainly, the Alabama Power Co. has no constitutional right to insist that it shall be the sole purchaser

of the energy generated at the Wilson Dam; that the energy shall be sold to it or go to waste."

In conclusion, the Court discussed the plaintiffs' contention that, by virtue of its ownership of the dam and power plant, the Government could enter into a wide variety of industrial activities having no relation to the purpose for which it was established. This contention was regarded as irrelevant to the limited issue raised.

"... The argument is earnestly presented that the Government by virtue of its ownership of the dam and power plant could not establish a steel mill and make and sell steel products, or a factory to manufacture clothing or shoes for the public, and thus attempt to make its ownership of energy, generated at its dam, a means of carrying on competitive commercial enterprises and thus drawing to the Federal Government the conduct and management of business having no relation to the purposes for which the Federal Government was established. The picture is eloquently drawn but we deem it to be irrelevant to the issue here. The Government is not using the water power at the Wilson Dam to establish any industry or business. It is not using the energy generated at the dam to manufacture commodities of any sort for the public. The Government is disposing of energy itself which simply is the mechanical energy, incidental to falling water at the dam, converted into the electric energy which is susceptible of transmission.

"The question here is simply as to the acquisition of the transmission lines as a facility for the disposal of that energy. And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States. As we have said, these transmission lines lead directly from the dam, which has been lawfully constructed, and the question of the constitutional right of the Government to acquire or operate local or urban distribution systems is not involved. We express no opinion as to the validity of such an effort, as to the status of any other dam or power development in the Tennessee Valley, whether connected with or apart from the Wilson Dam, or as to the validity of the Tennessee Valley Authority act or of the claims made in the pronouncements and program of the Authority apart from the questions we have discussed in relation to the particular provisions of the contract of January 4, 1934, affecting the Alabama Power Co."

In his concurring opinion MR. JUSTICE BRANDEIS, while not disagreeing with the conclusion on the constitutional question, expressed the view that the question should not be decided, because the plaintiffs had not the requisite interest entitling them to maintain the suit.

"Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it."

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"I do not disagree with the conclusion on the constitutional question announced by the Chief Justice; but, in my opinion, the judgment of the Circuit Court of Appeals should be affirmed without passing upon it. The Government has insisted throughout the litigation that the plaintiffs have no standing to challenge the validity of the legislation. This objection to the maintenance of the suit is not overcome by presenting the claim in the form of a bill in equity and complying with formal prerequisites required by Equity Rule 27. The obstacle is not procedural. It inheres in the substantive law, in well settled rules of equity, and in the practice in cases involving the constitutionality

of legislation. Upon the findings made by the District Court, it should have dismissed the bill."

In support of this position an analysis of the applicable substantive law was presented, showing that ordinarily a stockholder may not interfere with the action of the board of directors.

"The plaintiffs who object own about one-three hundred and fortieth of the preferred stock. They claimed at the hearing to represent about one-ninth of the preferred stock; that is, less than one forty-fifth in amount of all the securities outstanding. Their rights are not enlarged because the Tennessee Valley Authority entered into the transaction pursuant to an act of Congress. The fact that the bill calls for an enquiry into the legality of the transaction does not overcome the obstacle that ordinarily stockholders have no standing to interfere with the management. Mere belief that corporate action, taken or contemplated, is illegal gives the stockholder no greater right to interfere than is possessed by any other citizen. Stockholders are not guardians of the public. The function of guarding the public against acts deemed illegal rests with the public officials.

"Within recognized limits, stockholders may invoke the judicial remedy to enjoin acts of the management which threaten their property interests. But they cannot secure the aid of a court to correct what appear to them to be mistakes of judgment on the part of the officers. Courts may not interfere with the management of the corporation, unless there is bad faith, disregard of the relative rights of its members, or other action seriously threatening their property rights. This rule applies whether the mistake is due to error of fact or of law, or merely to bad business judgment. It applies, among other things, where the mistake alleged is the refusal to assert a seemingly clear cause of action, or the compromise of it. . . . If a stockholder could compel the officers to enforce every legal right, courts, instead of chosen officers, would be the arbiters of the corporation's fate."

MR. JUSTICE BRANDEIS was also of the opinion that the plaintiffs had not made the proper showing as required by equity practice. With respect to this he said:

"Even where property rights of stockholders are alleged to be violated by the management, stockholders seeking an injunction must bear the burden of showing danger of irreparable injury, as do others who seek that equitable relief. In the case at bar the burden of making such proof was a peculiarly heavy one. The plaintiffs, being preferred stockholders, have but a limited interest in the enterprise, resembling, in this respect, that of a bondholder in contradistinction to that of a common stockholder. Acts may be innocuous to the preferred which conceivably might injure common stockholders. There was no finding that the property interests of the plaintiffs were imperiled by the transaction in question; and the record is barren of evidence on which any such finding could have been made."

The practice in constitutional cases was thought also to require a denial of the right of the plaintiffs to maintain their suit. Summarizing the rules which have been evolved in such cases, the learned JUSTICE said:

"The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

"1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.' . . .

"2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it. . . .'

'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' . . .

"3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' . . .

"4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. . . . Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. . . .

"5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. . . . Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. . . . The court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In *Massachusetts v. Mellon*, 262 U. S. 447, the challenge of the federal Maternity Act was not entertained although made by the Commonwealth on behalf of all its citizens.

"6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. . . .

"7. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. . . .

A review then followed of decisions relied on in support of the plaintiffs' right to sue. These cases were distinguished from the case at bar, and MR. JUSTICE BRANDEIS said of them:

"If, or in so far as, any of the cases discussed may be deemed authority for sustaining this bill, they should now be disapproved. This Court, while recognizing the soundness of the rule of *stare decisis* where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous."

MR. JUSTICE BRANDEIS also expressed the opinion that if the Power Company ever had the right to challenge the transaction, its right had been lost by estoppel, and thereby the plaintiffs also were estopped.

It was further urged that, even if the stockholders have a standing to challenge the validity of legislation, an injunction should be denied, unless the alleged invalidity is clear.

"Even where by the substantive law stockholders have a standing to challenge the validity of legislation under which the management of a corporation is acting, courts should, in the exercise of their discretion, refuse an injunction unless the alleged invalidity is clear. This would seem to follow as a corollary of the long established presumption in favor of the constitutionality of a statute. . . .

"The challenge of the power of the Tennessee Valley Authority rests wholly upon the claim that the act of Congress which authorized the contract is unconstitutional. As the opinions of this Court and of the Circuit Court of Appeals show, that claim was not a matter 'beyond peradventure clear.' The challenge of the validity of the Act is made on an application for an injunction—a proceeding in which the court is required to exercise its judicial discretion. In proceedings for a mandamus, where, also, the remedy is granted not as a matter of right but in the

exercise of a sound judicial discretion. . . . Courts decline to enter upon the enquiry when there is a serious doubt as to the existence of the right or duty sought to be enforced."

MR. JUSTICE STONE, MR. JUSTICE ROBERTS and MR. JUSTICE CARDOZO joined in the opinion of MR. JUSTICE BRANDEIS.

MR. JUSTICE McREYNOLDS delivered a dissenting opinion. In this opinion he agreed that the plaintiffs had presented a justiciable controversy requiring decision. He also agreed that under appropriate circumstance the United States may dispose of water power or electricity developed in connection with the lawful improvement of navigable waters. He was of the opinion, however, that the contract with the Power Company should not be considered narrowly, but in relation to the whole transaction. Concerning these matters he said:

"Considering the consistent rulings of this court through many years, it is not difficult for me to conclude that petitioners have presented a justiciable controversy which we must decide. In *Smith v. Kansas City Title Company*, 255 U. S. 180, the grounds for jurisdiction were far less substantial than those here disclosed. We may not with propriety avoid disagreeable duties by lightly forsaking long respected precedents and established practice.

"Nor do I find serious difficulty with the notion that the United States, by proper means and for legitimate ends, may dispose of water power or electricity honestly developed in connection with permissible improvement of navigable waters. But the means employed to that end must be reasonably appropriate in the circumstances. Under pretense of exercising granted power, they may not in fact undertake something not entrusted to them. Their mere ownership, e. g., of an iron mine would hardly permit the construction of smelting works followed by entry into the business of manufacturing and selling hardware, albeit the ore could thus be disposed of, private dealers discomfited and artificial prices publicized. Here, therefore, we should consider the truth of petitioners' charge that, while pretending to act within their powers to improve navigation, the United States, through corporate agencies, are really seeking to accomplish what they have no right to undertake—the business of developing, distributing and selling electric power. If the record sustains this charge, we ought so to declare and decree accordingly.

"The Circuit Court of Appeals took too narrow a view of the purpose and effect of the contract of January 4, 1934. That went far beyond the mere acquisition of transmission lines for proper use in disposing of power legitimately developed. Like all contracts, it must be considered as a whole, illumined by surrounding circumstances. Especial attention should be given to the deliberately announced purpose of Directors, clothed with extraordinary discretion and supplied with enormous sums of money. With \$50,000,000 at their command they started out to gain control of the electrical business in large areas and to dictate sale prices. The power at Wilson Dam was the instrumentality seized upon for carrying the plan into effect.

"While our primary concern is with this contract, it cannot be regarded as a mere isolated effort to dispose of property. And certainly to consider only those provisions which directly relate to Alabama Power Company is not permissible. We must give attention to the whole transaction—its antecedents, purpose and effect—as well as the terms employed.

"No abstract question is before us; on the contrary, the matter is of enormous practical importance to petitioners—their whole investment is at stake. Properly understood, the pronouncements, policies and program of the Authority illuminate the action taken. They help to reveal the serious interference with the petitioners' rights. Their property was in danger of complete destruction under a considered program commenced by an agency of the National Government with vast resources subject to its discretion and backed by other agencies likewise intrusted with discretionary use of huge sums. The threat of com-

petition by such an opponent was appalling. The will to prevail was evident. No private concern could reasonably hope to withstand such force."

A review was then presented of the findings of the trial court in regard to the circumstances surrounding the making of the contract, including the statutory powers of the Authority and its declared policies and purposes. These, it was urged, disclosed a broader purpose than the mere sale of surplus power.

"The record leaves no room for reasonable doubt that the primary purpose was to put the Federal Government into the business of distributing and selling electric power throughout certain large districts, to expel the power companies which had long serviced them, and to control the market therein. A government instrumentality had entered upon a pretentious scheme to provide a 'yardstick' of the fairness of rates charged by private owners, and to attain 'no less a goal than the electrification of America.' 'When we carry this program into every town and city and village, and every farm throughout the country, we will have written the greatest chapter in the economic, industrial and social development of America.' Any reasonable doubt concerning the purpose and result of the Contract of January 4th or of the design of the Authority should be dispelled by examination of its Reports for 1934 and 1935.

"The conception was to establish an independent network comparable in all respects with the electric utility system serving the area, with which TVA sought to establish interchange arrangements, both as outlets for its own power and to use existing systems as a standby or back-up service."

For a detailed analysis of the findings of the trial court, the dissenting opinion itself must be referred to. It must suffice here to present the conclusions of law quoted in the opinion of MR. JUSTICE McREYNOLDS, and his conclusion that the decree of the trial court should be affirmed. Of these, the opinion states:

"As matter of law the trial court found—

"The function intended by TVA under the evidence in relation to service, utility in type, in the area ceded by the contract of January 4, 1934, transcends the function of conservation or disposition of government property, involves continuing service and commercial functions by the government to fill contracts not governmental in origin or character."

"Performance of the contract of January 4, 1934 would involve substantial loss and injury to the Alabama Power Company, including, inter alia, the loss or abandonment of franchises, licenses, going business and service area supporting its general system and power facilities and unless resisted would tend to invite a progressive encroachment on its service area by the Tennessee Valley Authority."

"Congress has no constitutional authority to authorize Tennessee Valley Authority or any other federal agency to undertake the operation, essentially permanent in character, of a utility system, for profit, involving the generation, transmission and commercial distribution of electricity within State domain, having no reasonable relation to a lawful governmental use."

"The contract of January 4, 1934, expressly provided for the transfer of all or substantially all of the lines and properties of the Alabama Power Company for the service of the ceded area, included transmission lines, rural distribution systems and certain urban distribution systems, and contemplated the eventual transfer of fourteen urban distribution systems. This contract, expressly contemplating service of the ceded area by the Tennessee Valley Authority with electricity to be generated or purchased by the Tennessee Valley Authority for that purpose, was in furtherance of illegal proprietary operations by the Tennessee Valley Authority in violation of the Federal Constitution and void. The contract was accordingly ultra vires and void as to the Alabama Power Company."

"Having made exhaustive findings of fact and law, the trial court entered a decree annulling the January 4th

contract and enjoining the Alabama Power Company from performing it. The Circuit Court of Appeals reversed, upon the theory that the Authority was making proper arrangements for sale of surplus power from the Wilson dam. The injunction was continued.

"I think the trial court reached the correct conclusion and that its decree should be approved. If under the thin mask of disposing of property the United States can enter the business of generating, transmitting and selling power as, when and wherever some board may specify, with the definite design to accomplish ends wholly beyond the sphere marked out for them by the Constitution, an easy way has been found for breaking down the limitations heretofore supposed to guarantee protection against aggression."

The case was argued by Messrs. Forney Johnston and James M. Beck for the petitioners, and by Mr. John Lord O'Brian for the respondents.

#### Taxation—Valuation for Purpose of Taxation—Due Process

Where the same methods are employed for two successive years, by a state board of equalization, in determining the value of railroad property within the state, for the purpose of taxation, and substantially the same valuation is assessed for both years, despite an enormous and progressive decline in all property values throughout the period, the assessment is excessive, through failure to give weight to the decline in values. A tax based thereon is invalid as a denial of due process of law, to the extent that it is based upon such excessive assessment.

*Great Northern Railway Company v. Weeks*, et al., 80 Adv. Op. 396; 56 Sup. Ct. Rep., 426.

This case involved questions as to the validity of taxes imposed by state and local taxing authorities of North Dakota, for 1933, on the properties of the petitioner, Great Northern Railway Company. The Railway brought a suit for an injunction in a federal court, asserting that the taxes challenged were based on a valuation which included properties lying outside the State, and were so excessive and arbitrary as to be violative of the due process and equal protection clauses of the Fourteenth Amendment, and of the commerce clause. After hearing, the district court dismissed the bill, and the Circuit Court of Appeals affirmed. On certiorari, the decree was reversed, in an opinion by MR. JUSTICE BUTLER, with three of the Justices dissenting.

The assessed value of the petitioner's railroad properties in the State was \$78,832,888, and the total tax \$1,508,352.34, of which the petitioner paid about 60%. The value thus assessed for the year 1933 was substantially the same as that assessed in 1932. The state law requires that all property subject to taxation be assessed at its true and full value in money. The petitioner did not attack the valuation as discriminatory, but on the grounds that the assessment included excess value to the extent of approximately \$20,000,000, by reason of the methods employed for ascertaining the percentage of system value to be assigned to North Dakota, and that, disregarding the allocation, the assessment was arbitrary and excessive to the extent of \$15,000,000.

The method of valuation was first analyzed. This disclosed the use of a composite of the average stock and bond values of the petitioner for a five year period, and an average value ascertained by capitalizing net earnings for the same period, in order to obtain a value for the whole system. A value was then apportioned to the property in North Dakota upon the average of

five factors: (1) miles of track, (2) physical property, (3) car and locomotive miles, (4) ton and passenger miles, and (5) gross earnings.

The Court then considered the contention that the tax board had attributed to North Dakota, property located outside of the State. Upon analysis, this contention was rejected.

The contention that the assessment was arbitrary and excessive, however, was sustained. In sustaining this contention the Court emphasized that in arriving at the 1933 valuation the tax board had arbitrarily adopted the 1932 assessment, without giving weight to the fact that values had decreased enormously and progressively throughout the years of the depression. Without summary of the analysis of the processes of valuation and allocation, the basis of the Court's decision may be understood from the following portion of the opinion of Mr. JUSTICE BUTLER:

"If the system value for 1933 had been computed on the basis of the stock and bond and capitalized income methods used for 1932, it would have been \$345,188,820, about 83% of the corresponding figure for 1932, less than 76% of like figures for 1931 and 1930 and about 79% of that for 1929. . . The 1933 assessment exceeds what would have been made on system valuation based on the five-year average of stock and bond values, apportioned by use of the five factors above described (advocated by the State as 'the fairest basis of allocation') by 19.97%, exceeds that based on net operating income capitalized by 29.44%, on the composite of both by 24.52%. The testimony and computations made by respondents' witness show that the 1933 assessment could not have been arrived at by any calculation based on the principles and methods governing the tax commissioner in his computations submitted to the board through a period of years and constituting the controlling bases of the assessments made by it. The five-year average of the composite of the stock and bond and capitalized income values, held by all to be the best method, produced for 1932 a valuation within one-sixth of one per cent of the assessment for that year. The board arbitrarily adopted that assessment, less value of a short stretch of track removed, as the assessment for 1933. If the assessment for that year had been based on the principles governing in 1932 and preceding years, it would have been less by about \$13,000,000 than the amount fixed by the board and here in controversy.

"The long period through which, even in 1933, the depression had extended compelled the conclusion that it was not temporary. Judicial notice must be taken of the fact that late in 1929 there occurred a great collapse of values of all classes of property—railroads, other utilities, commodities and securities, and that the depression then commenced progressively became greater. In making assessments in that period, the board was bound to take into account and give due weight to the sudden, progressive and enormous declines of value.

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"Changed business conditions affecting petitioner's traffic coupled with competition from new methods of transportation precluded belief that prospective improvement in petitioner's business and earnings would within a reasonable time, if ever, be sufficient to justify the assessment in question. . . But from 1929 to and including 1933 the board reduced assessments of petitioner's North Dakota railroad properties by less than six per cent. It is everywhere known that the general decline in values in that period was very much greater than that. The evidence conclusively shows that the value of petitioner's system and of its North Dakota railroad properties declined several times six per cent. Its traffic, gross earnings and net income from operation fell off enormously. The 1929 collapse and the decline progressively following it resulted in much lower levels of prices and values which at least as

early as 1933 were to be regarded not as temporary but as at least relatively permanent. . .

"In cases such as this, courts are not permitted to weigh evidence of value. They may not substitute their opinions for the findings of assessing officers or boards. But, when the jurisdiction of the district court is appropriately invoked, it is its duty to decide upon the merits of the taxpayer's claim that the assessment of his property was arbitrarily made and is grossly excessive. It clearly appears that the board failed to give reasonable weight to the falling off of petitioner's traffic, gross earnings, operating income, the extraordinary shrinkage in values of railroad properties, the prices of commodities and securities generally. The value of petitioner's property varied with the profitability of its use, present and prospective. . . Petitioner's system net operating income was for 1929 in round figures \$32,457,000; in the following years \$21,912,000, \$12,669,000, \$1,290,000. The board persistently disregarded known conditions essential to the just ascertainment of value. While the vanishing of values described by respondents' witness, the reduction of the tax base from 75% to 50% and the established limitations upon rates of taxation justify diligence on the part of the assessing authorities that taxable property be assessed at full value, neither these nor any other conditions warrant or excuse arbitrary or excessive valuations.

"The facts alleged in respondents' answer and those shown by the testimony of their witness and his computations above described compel the conclusion that, by reason of changed conditions affecting value, the methods or system by which the board arrived at the 1933 value of petitioner's railway as a whole were plainly calculated to produce a grossly excessive assessment of its North Dakota property for that year. That assessment being shown to have been arbitrarily made and grossly excessive, petitioner's right to relief was not conditioned upon overassessment or upon its submission to overtaxation in 1932 or any prior year. It follows that the lower courts erred in holding that petitioner was not entitled to any relief. The evidence persuasively supports petitioner's claim that by reason of system overvaluation the North Dakota assessment was too high by \$15,000,000. And, resolving all doubts in favor of validity, the evidence must be held conclusively to show that the challenged assessment exceeds the true and full value of petitioner's North Dakota railroad properties in 1933 by \$10,000,000. . . The board's failure to consider the enormous diminution in value of petitioner's property caused by the 1929 collapse and the progress of the depression is, within the principles of our decisions, the equivalent in law of intention to make a grossly excessive assessment for 1933 in disregard of petitioner's rights under the due process clause of the Fourteenth Amendment."

An injunction was ordered, accordingly, against collection of any tax based on the \$10,000,000 held to be excessive valuation.

Mr. JUSTICE STONE delivered a dissenting opinion. In this opinion the theory of the majority decision was thus explained:

"This conclusion is based on an elaborate examination of the evidence produced before the trial court, evidence which it is assumed affords the only basis for the valuation of the Board of Equalization. Emphasizing as the important, if not controlling factors, in determining taxable value, the depressed market value of the securities of the entire railroad, representing its property in many states, its diminished earnings, its capitalized value based on what it considers, for this purpose, a fair rate of return, the Court concludes that, as prices of securities and earnings were much lower in 1933 than in 1932 and earlier years, the valuation of the railroad property in North Dakota for that year should have been correspondingly reduced. And because the decline in value found by this formula is substantial, something like 20%, and as the Board placed the same valuation on the property in 1933 as in 1932, it is declared that the valuation is so arbitrary

as to make any tax based upon it a violation of due process."

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"The feature of the decision which is especially a matter of concern is that for the first time this Court is setting aside a tax as a violation of the Fourteenth Amendment on the ground that the assessment on which it is computed is too high, without any showing that the assessment is discriminatory or that petitioner is in any way bearing an undue share of the tax burden imposed on all property owners in the state."

The dissenting opinion emphasized the fact that there was no finding that the valuation of property within the State was disproportionate to property outside, and no finding or claim of discrimination of the railway's property as compared with other property in the State. The sole ground for holding the tax unconstitutional was that it was based upon an excessive valuation. This was thought to ignore the principle upon which property taxes are laid and collected. As to this, Mr. JUSTICE STONE said:

"Taxation is but a method of raising revenue to defray the expense of government, and of distributing the burden among those who must bear it. The taxpayer cannot complain of the tax burden which he has to bear, who shows no inequality in the application of it. And plainly he does not show inequality merely by proving that the valuation of his property for taxation is much higher than its market or its condemnation value."

"The burden of a property tax like the present is distributed by applying a rate of tax to the assessed valuation of all taxable property. Variation of either, without discrimination, affects the amount of the tax but not the equality of its distribution. The activities and expenses of government, over which the state has plenary control, do not cease in time of depression. They may increase. The state may meet those expenses by raising the valuation of taxable property, or by raising tax rates, or both, without infringing any constitutional immunity. Here the state, so far as appears, is raising the needed revenue and distributing the burden as in previous years, by continuing old valuations. However high those valuations may be, if not discriminatory, they impose no unequal share of the tax burden on petitioner and cannot be said to be arbitrary or oppressive in the constitutional sense."

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO concurred with Mr. JUSTICE STONE.

The case was argued by Mr. F. G. Dorey for the petitioner, and by Mr. Harold D. Shaft for the respondents.

#### Constitutional Law—Due Process of Law—Power of State to Abridge Freedom of Press

The Louisiana license tax on publishers of newspapers selling advertising published in any newspaper having a circulation of over 20,000 copies per week, imposed in addition to all other taxes, is invalid under the due process clause of the Fourteenth Amendment, as an unwarranted interference with the freedom of the press, guaranteed by that Amendment.

*Grosjean v. American Press Co. Inc., et al.*, 80 Adv. Op. 459; 56 Sup. Ct. Rep. 444.

In this case the Court held invalid the Louisiana statute imposing a tax upon the business of selling, or making a charge for, advertising. The tax is denominated a license tax; its rate is 2% of gross receipts; and its application is as to every publisher of a paper or periodical having a circulation of more than 20,000 copies per week.

The case arose on the suit of nine publishers, brought in the federal district court, for an injunction

against enforcement of the tax. These publishers publish 13 newspapers, which are the only ones in the State having each a circulation of more than 20,000 copies per week. There are published in the State 120 weekly newspapers, in competition to a greater or less degree with those of the publishers who brought the suit.

The operation of the statute was thus described:

"The tax imposed is designated a 'license tax for the privilege of engaging in such business'—that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of two per cent on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid . . . , it well might result in destroying both advertising and circulation."

The district court granted a permanent injunction. On appeal to the Supreme Court, the decree was affirmed, in an opinion by Mr. JUSTICE SUTHERLAND.

In this opinion the Court briefly disposed of two jurisdictional objections, that the amount in controversy does not exceed \$3,000, and that the bill made no case for equitable relief. Both these objections were found to be without merit.

After a brief discussion of the two objections mentioned, the Court proceeded directly to a consideration of the constitutional questions presented, (1) whether the statute abridges freedom of the press in violation of the due process clause of the Fourteenth Amendment, and (2) whether there is a violation of the equal protection clause of that Amendment.

The importance of the constitutional question was thus emphasized by Mr. JUSTICE SUTHERLAND:

"The first point presents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the federal Constitution provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . .' While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech, or of the press by force of the due process clause of the Fourteenth Amendment."

The Court then observed that, despite the sweeping language of *Hurtado v. California*, 110 U. S. 516, it has subsequently been held that certain fundamental rights, safeguarded by the first eight amendments against federal action, are also protected against state action by the due process clause of the Fourteenth Amendment. Among the latter are the rights of freedom of speech and of press.

A summary then followed of the history and circumstances attending and antedating the adoption of the abridgement clause of the First Amendment. The efforts to curb the press at first took the form of censorship. As to this Mr. JUSTICE SUTHERLAND said:

"For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents

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## MAKING DISCIPLINARY PROCEDURES MORE EFFECTIVE

The Indispensable Condition Precedent to a Vitalization of Disciplinary Procedure Is the Existence of a Real Will on the Part of the Profession to Achieve Better Results—The Situation under the Different Forms of Bar Organization—Difficulties to Be Overcome—Clear Understanding of the Ends to Be Achieved Is Necessary—Better Facilities for Clients Who Think They Have Grievances, etc.

By H. W. ARANT

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IT is generally assumed that a substantial part of the ill repute from which the legal profession suffers at the present time is due to the fact that a substantial number of lawyers are able somehow to remain in the profession, notwithstanding the fact that their professional practices are such that they should be disbarred. That the disciplinary procedures that have been set up for the purpose of dealing with such lawyers have not generally produced satisfactory results has been so often asserted as a fact, without denial, that its truth may be accepted as a starting point in this discussion. On this assumption, the Bench and Bar are challenged to devise a procedure that will replace failure with a greater measure of success. The existence of this challenge does not require the assumption that present procedure is altogether ineffective, nor is there here any assertion that this is so. In every state, it results in some measure in the imposition of discipline upon lawyers who have behaved improperly professionally. In some states, however, unprofessional conduct is much more promptly and surely followed by discipline than in others. Some of this difference is undoubtedly but a reflection of a difference in the profession's interest in achieving more generally the ends for which disciplinary procedure strives. Some of the difference is undoubtedly due to the organization and perfection of a machinery and procedure that in substantial measure tends to overcome or neutralize certain factors that have made for less efficiency where the older procedures obtain. It is generally conceded that the disciplinary procedures set up in those states where the integrated bar form of organization exists is more effective than that in the much larger number of states which have the voluntary form of bar organization.

It is obvious that an indispensable condition precedent to a renovation or vitalization of disciplinary procedure is the existence of a real will on the part of the profession to achieve better results; a mere wish or favorable inclination will not suffice. Neither change in machinery nor improvement in its operation is likely unless the old machinery or its manner of operation is generally genuinely disappointing to the Bench and Bar. Certainly changes in the machinery set up are not likely to be followed by substantially improved results if those who must operate it are uninterested in or opposed to the uniform elimination of the unethical and worse members of the profession. Consequently,

if the profession is fairly well satisfied with its position in public esteem or denies the validity of the criticism that it has been and is receiving, its improvement through the elimination of its unethical members is unlikely, whatever the available disciplinary procedures. Both lawyers and courts must desire better results and be willing to work for them if they are to be attained. It hardly needs to be stated that a good deal of the work that will have to be done will be far from pleasant.

Where the voluntary form of bar organization obtains, grievance committees are appointed for the purpose of receiving and investigating complaints against lawyers and this is true whether the organization be national, state, county or city in scope. Such committees are generally appointed by the president of the association and are often, if not generally, without authority to do more than make recommendations. For example, such a committee cannot generally expel a lawyer from membership or impose upon him any other form of discipline. Such action can be taken only by an executive committee to which the grievance committee must make its recommendation. There is no uniform practice as to whether the grievance committee, as such, initiates court proceedings looking to disbarment when its findings appear to warrant such a course.

When such a committee receives a complaint it has the responsibility for making such preliminary investigation as is necessary to determine whether there is reasonable ground to believe that professional misconduct has occurred. This inquiry is generally very informal, as secret as possible and may not, though it generally does, include a discussion of the matter with the lawyer involved. If the committee is of the opinion that professional misconduct has probably occurred, the client is asked to file a formal complaint, if this was not done in the beginning, and the lawyer is furnished a copy of it and notified of the date of the hearing, which may result in a recommendation of discipline, as indicated above. In smaller communities, the effectiveness of this procedure is often especially impaired by the fact that an acquaintance or friendship exists between some one of its members and the lawyer complained of. Occasionally the lawyer complained of is of such prominence that members of a Grievance Committee do not desire to incur his ill will or that of his friends by pushing through an effective investigation, recommending discipline and taking the lead in the institution of a disciplin-

any suit in the courts when the investigation indicates that such a proceeding is warranted or required. Besides, it occasionally is true that the lawyer complained of is of such influence and has such connections with the grievance committee that it is believed futile to file a complaint. In addition, ordinary grievance committees are handicapped in such investigations because they do not have the power to subpoena witnesses and administer oaths. Moreover, the limit of the discipline which a voluntary bar organization can impose is expulsion from membership. The exercise of this power is relatively ineffective because so large a percentage of the lawyers in states where this form of organization obtains do not belong to the association and for the further reason that, when expulsion does occur, the lawyer's right to practice law is left unimpaired.

Occasionally suggestions of professional dereliction are made to or observed by the courts which are referred to Grievance Committees for investigation and report. But, even when the initiation is by such a respectable source, the Grievance Committee is handicapped in the respects above mentioned.

The greatest difficulties about attaining that measure of disciplinary action required by the profession's welfare are the lack of willingness on the part of those who know of professional misconduct to initiate disciplinary proceedings, or ignorance as to how to start them. Lawyers probably most often know of improper practices among lawyers. They of course know what to do but for obvious reasons are averse to initiating proceedings. Clients who are wronged are often ignorant as to what to do or where to go to get an investigation started. But when this is not so, they generally lose interest in discipline of the lawyer if he makes amends by satisfying their demands. Because, however, of the fact that the lawyer's dereliction tends to indicate his unfitness in respect to character to continue as a lawyer, the profession's interest, as well as that of the public, requires that the matter culminate in a decision of this question. When the client loses his interest, however, the grievance committee, without the power to subpoena witnesses, cannot proceed further. Unfortunately the Committee, which exists to promote the welfare of the profession and the public, is too willing to stop as soon as those who set it in operation relieve it from the necessity of proceeding. It hardly needs to be stated that this attitude of committees must be modified and lawyers must more generally report misconduct of their brethren if elimination of undesirables is to be accomplished in satisfactory measure.

Where the voluntary form of Bar organization exists the responsibility of the courts is almost as great as that of the lawyers. Unless they refer matters for investigation when professional misconduct is suggested or appears to them, they contribute to lack of proper disciplinary results. If they decline to impose discipline when lawyers have gone to the trouble to make investigations and initiate proceedings and prove misconduct, they not only prevent discipline but may, in a real sense, be said to encourage professional delinquency. To the extent to which the courts decline to impose properly severe discipline where misconduct is proved they likewise fail to protect the public and the profession and, in addition, discourage lawyers and others from initiating proceedings where they seem proper.

That the courts are often deserving of criticism for the inconsequential or too mild discipline, where their judgments state and describe the misconduct that has been proved, is obvious to anyone who consistently reads the reports of cases involving disciplinary matters.

In states where the integrated form of bar organization exists, the Bar possesses more power. It has the power to subpoena witnesses and administer oaths. In consequences, such organizations maintain a well known central office which receives complaints and refers them to local administrative committees, unless the complaint is filed with such a committee to begin with. This local committee makes such a preliminary investigation as results in sifting out such complaints as are clearly without merit. When a complaint seems to be supported in fact, there is a formal hearing and recommendation to the Board of Governors of such discipline as to it seems proper. The Board of Governors has power to disregard the local committee's recommendation in the discipline it adjudges to be proper. The discipline imposed by the Board of Governors stands, however, unless the lawyer appeals to the Supreme Court. The Supreme Court is the only court that acts and it functions only as a court of review, while under the older form of organization all charges of professional misconduct are tried in the courts in the first instance, as are other cases, and often ultimately find their way to the Supreme Court. The frequency, however, with which the courts in integrated bar states substantially reduce the discipline adjudged by the Bar to be proper indicates the helplessness of the Bar when the Court is not properly in earnest about improving the Bar. The power of the Courts so to reduce the discipline determined upon by the Bar likewise indicates the largeness of their responsibility in achieving and maintaining professional integrity.

In a few other jurisdictions where Grievance Committees of bar associations have been given extraordinary power by the court, disciplinary procedure has also been made thoroughly effective. Recommendations of these committees go to the Supreme Court either directly or via the governing board of the bar association. In Missouri, the court has appointed its own committees in each of the thirty-six districts of the state, and these function under a general chairman, also appointed by the court, and an advisory committee. These methods have been effective because the committees have been given real power and because their decisions, made after a careful investigation, go directly to a court of last resort, resulting in action by it without undue delay.

Intelligent effort to improve disciplinary procedure requires a clear understanding of the ends sought to be achieved. Almost the only end now avowed is ridding the profession of undesirables. The importance of this accomplishment cannot be overemphasized. Nor would it be suggested that this is not still the chief end of disciplinary procedure because there is no doubt that a large measure of the ill repute which the legal profession now bears it deserves because it has resulted from the conduct of lawyers who should have been disbarred. It is true, however, that individual lawyers, and in consequence, the profession not infrequently bear a measure of bad repute which they do not deserve. Clients often misunderstand situations and errone-

cusly ascribe shabby treatment to their lawyers. Such impressions are passed on by the client to his friends and the lawyer thus obtains some undeserved bad repute and, in the process, the profession as a whole likewise undeservedly suffers. There is probably no way of entirely preventing this unfortunate consequence of the client's misunderstanding. It is believed, however, that, if it were generally known that the profession provides accessible agencies to which clients may have recourse when they believe they have grievances against lawyers, a large part of this unfortunate consequence could be prevented. As a result of his contact with such an agency, the client would often receive an explanation which would satisfy him, restore his faith in his lawyer and prevent his passing on to others his honest but erroneous impressions of his lawyer. Implicit in this suggestion is the assertion that in the investigations of charges against a lawyer his exoneration should be as definitely an objective as has heretofore been his discipline.

The provision of such facilities as are here suggested obviously requires the existence of offices staffed with persons skilled both in investigation and in making contacts. Such persons should be capable of appreciating the client's point of view and of sympathizing with it. They should be able to make the client feel that his story has been sympathetically listened to, properly investigated and that he had misunderstood the situation, where such is in fact the case. The client of course will not be so convinced in every case but this not a persuasive argument against the provision of machinery whose operation would undoubtedly prevent much of the honest but erroneous impression that is now injuring lawyers.

Assuming the availability of such facilities, some of the important phases of its operation and procedure may be considered.

The dissatisfied client, as stated above, should be listened to sympathetically and patiently and except in clear cases, his statement of the facts should initially be accepted as true. When all this is done, it will sometimes be easy to see that the client has no grievance. It may not be so easy to convince him that this is so and it can never be done unless his confidence is first won. Much will depend upon the personality of the person who talks to the client.

Where the facts stated, if true, constitute improper conduct, the client should be made to feel that the matter will be thoroughly investigated. For the purpose of satisfying the investigator *prima facie* that the client has not misstated the facts nor misunderstood their import, an examination of records will sometimes suffice and the investigator will be able to convince the complainant that he has no grievance because the facts were not as he understood them or because facts not known to him change the import of those of which he did know. It will thus sometimes happen that the investigator will be able to satisfy the client without in any way approaching his lawyer. It hardly needs to be said that fairness to the lawyer requires that such investigations should be made as secretly as possible.

Where the matter cannot be disposed of satisfactorily by a mere examination of records or other sources of information which do not include the lawyer, he must be approached and given an opportunity to explain the situation. He may add facts not stated by the client that have an impor-

tant bearing on the situation or he may deny the facts stated by the client. In the former case, if a check of his statements convinces the investigator that he has satisfactorily explained the situation, he should notify the client to call and attempt to convince him that additional facts which he has discovered destroy the basis of complaint which he thought he had against his lawyer. If the lawyer denies the facts stated by the client, the investigator should send for him and instruct him as to how to file a complaint. It should be noted that up to this time everything may have occurred without the knowledge of anyone except the complainant, the investigator and the lawyer.

When the formal complaint has been filed, a copy or a summary of its substance should be served upon the attorney with a direction to reply by a specified date. When the reply is filed a date for hearing is set and this hearing should be conducted with as much secrecy as possible, unless the lawyer complained against desires otherwise. Any persons desired as witnesses by either the lawyer or the complainant should be subpoenaed and their testimony given under oath. In such hearings it may be doubted whether enforcement of all the technical rules of evidence will make for the ascertainment of truth. At any rate, there seems to be much less justification for the invocation for such rules than in a proceeding where the trial is by jury. In a few states, the right of trial by jury is conferred by statute. The more general rule, however, accords with the common law rule and denies the right of trial by jury in such a proceeding.

Moreover, it appears to be doubtful whether the spirit of the rules of the criminal law, in which the defendant is presumed to be innocent and his guilt required to be proved beyond a reasonable doubt, properly belong in such procedure. The real issue is whether the lawyer complained against has such character as fits him to continue as a member of the Bar. When he applies for admission, he must prove to the satisfaction of the admitting authorities that he has such character and it would not be unreasonable to imply an undertaking on his part that he will continue to bear that good character which is required for admission. Whenever reasonable ground to doubt that he still possesses that character is made to appear, it would seem reasonable for the court to call upon him to show that he still has it or have his license revoked. It is generally conceded that possession of good character is not susceptible of very satisfactory proof at the time when most men are admitted to the practice. They are young and often have not been subjected to strong temptation. Consequently, affirmative misconduct after they have begun practice, though small in amount, may have more significance at that time than a larger volume of general testimony of good character at the time of admission. It cannot be denied, however, that there is much judicial decision to the effect that a lawyer must not be disbarred unless serious misdoings by him are proved by evidence that would be sufficiently clear to justify his conviction upon an indictment. This view would be permissible if a disciplinary proceeding were a criminal proceeding but this is everywhere held to be not so.

In summary, the profession owes it to itself to investigate carefully any complaint which appears to be honestly made by a person of sound mind. It

should be as much concerned to exonerate a lawyer and prevent undeserved injury to his reputation as to eliminate an undesirable lawyer from the ranks of the profession. The procedure of investigation should take full cognizance of the fact that, from the mere fact that a complaint has been made, a lawyer is likely to be injured somewhat if that fact is known. Consequently, initial investigations should be conducted with as much secrecy as possible. Reasonable ground to believe in the truth of the charges having been discovered, the matter should be pursued with promptness, thoroughness and fearlessness by representatives of the Bar. Adequate discovery of the facts, however, requires the power to subpoena witnesses and administer oaths. When misconduct is found which is indicative of lack of character, the situation should be dealt with courageously. In such cases elimination of the lawyer is not only in the interest of the pro-

fession but of the public as well. In any stage of the investigation when the lawyer is found to be blameless, the representatives of his profession owe it to themselves and to him to make an earnest attempt to convince those who suspect him of misconduct that he was blameless. If it becomes generally known that a lawyer has been charged with misdeeds, findings which exonerate him should be given publicity with a view to preventing injury as much as possible. There will of course be some small injury to lawyers complained against, even when exonerated, in spite of all that can be done, but this is the price that the individual lawyer must contribute to a campaign which contemplates both the elimination of undesirables and stopping that undeserved injury to lawyers which results from honest but erroneous conclusions of clients. The campaign is one in which every honest and well meaning lawyer can enthusiastically enlist.

## EDWARD LIVINGSTON AND HIS LOUISIANA PENAL CODE

Remarkable Career of Livingston—Resigns New York Mayoralty and District Attorneyship to Enter Practice in New Orleans—The Louisiana of His Day—His Sympathetic Attitude towards the Local Views—Legislature Passes Act for Preparation of Criminal Code to Be Founded on the One Principle of the Prevention of Crime—Livingston Receives Appointment for Task—His Exceptional Qualifications for It—Modernity of Some of His Proposals—Code never Adopted, etc.

By JEROME HALL

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THE life<sup>1</sup> of Edward Livingston is an American epic. From its beginning on his ancestral estates in New York to its close one hundred years ago next May 23rd, it unfolds with sustained interest, dramatic and deeply inspiring. The boy spends his childhood in distinguished pre-revolutionary society, nurtured by fearless scholars who led the way to independence under banners proclaiming the rights of man, the innate worth of human beings and their freedom from governmental oppression. He hears, learns from, knows the great. On to Princeton; then the study of law both common and civil, and in company with future leaders of the Bar. To New York and eminence in practice. Soon he is elected to the United States Congress. Then he is appointed United States District Attorney for New York, and simultaneously is elected to and fills the office of Mayor of New York City. Yellow fever lays low the population, and he ministers unceasingly to the stricken folk. Weakened by his exertions, he falls, himself, victim to the epidemic. While thus confined, a clerk absconds with \$100,000—money due the United States. With no intimation of blame or liability, Livingston assumes the indebtedness, sells his entire belongings, assigns the proceeds to the United States and acknowledges a deficiency of approximately

\$44,000. With the hope of achieving quick financial success in New Orleans, he resigns the New York mayoralty and district attorneyship, and, aged 39, he goes in 1803 to Louisiana—to rise to eminence at the Bar and in public life and to immortality in the world of legal scholarship.

To understand the man and his work, and the quality of genius that uniquely fitted him for his abundant contribution, it is necessary to know the Louisiana of his day. Long before any settlement on the Atlantic coast, the Spaniards had explored Florida, founded St. Augustine, and penetrated the Southwest far into Mexico. Years later, in the last quarter of the seventeenth century, Marquette and Joliet cut a perilous route down the Father of the Waters until they came to the border of the Spaniards' southern domain, when, deterred by fear of enslavement or assassination, they turned back and brought their wonder-rousing reports to their compatriots in Canada. In 1682 the undaunted chevalier de La Salle led a party to the very mouth of the Mississippi, making no settlement but planting the flag of his king on the vast domain he called Louisiana. In 1699 three of the Le Moyne brothers left their Canadian estates, established successful settlements in Louisiana, and became the first governors.

From then until Spain took possession, constructively in 1762, actually in 1769, French law governed.

1. Charles H. Hunt, *Life of Edward Livingston* (1864).

In 1769 O'Reilly proclaimed Spanish laws and planted Spanish judicial and political institutions in the teeth of strenuous but, for the time being, inadequate resistance. In 1800 the Little Corporal forced Spain to surrender the American dominion; and in 1803 Livingston's older brother, Robert, and Monroe negotiated the Louisiana Purchase for fifteen million dollars.

The vast Louisiana Purchase included at least the present states of Louisiana, Arkansas, Missouri, Iowa, Oklahoma, Nebraska, North and South Dakota, Montana, Colorado, Wyoming, and part of Minnesota. When Livingston arrived in New Orleans in 1804 he found a town of about 8,000 inhabitants, half of whom were white persons, chiefly of French descent. In 1806 the territory had a population of about 53,000 persons of whom 23,500 were slaves, 3,500 free colored, and 26,000 whites, of whom more than half were natives of Louisiana, mostly French.<sup>2</sup>

In Louisiana Livingston found men of learning and ability, devoted to French culture, and resentful of attempts to substitute an alien language and alien laws. His sympathetic grasp of the situation is an object lesson in the resolution of culture conflicts. He endeared himself by his distinguished services in support of the civil law. In the second year of his residence he simplified the civil practice and procedure, and saw his recommendations enacted April 10, 1805. Twenty years later, he collaborated with Lislet and Derbigny in the drafting of both the Code of Practice of 1825 and the Civil Code.

On May 4, 1805 the Territory passed a comprehensive act naming, but not defining, practically all of the important common law crimes, and adopting the English common law system, both substantive and procedural, as regards the designated offenses. Subsequent crimes were to be defined by statute. Between 1805 and 1821 a number of other penal statutes were enacted. The Congressional Act of March 26, 1804 had provided for the continuance of those territorial laws not inconsistent with jury trial, habeas corpus, bail, and the privilege against "cruel and unusual punishments." Livingston was convinced that the congressional and territorial legislation did not completely abolish the prior Spanish penal law. Later decisions indicate rather clearly that the judges in fact looked to the English law for interpretation; and it does not appear that Spanish laws were drawn upon to any extent either for that purpose or to fill in lacunae. But that possibility combined with numerous difficulties of the common law and the confusion resulting from hastily drawn legislation, to induce wide reform.

On February 10, 1820 the General Assembly of Louisiana passed the historic act providing that there be prepared a code of criminal law to be "founded on one principle, viz., the prevention of crime; that all offences should be clearly and explicitly defined, in language generally understood; that punishments should be proportioned to offences; that the rules of evidence should be ascertained as applicable to each offence; that the mode of procedure should be simple, and the duty of magistrates, executive officers and individuals assisting them, should be pointed out by law."<sup>3</sup> In February, 1821 Livingston received the appointment—57 years of age, at the peak of his intellectual vigor, and with vast varied experience, a linguist versed in Latin, French, and Spanish, a scholar familiar with Roman and comparative law, a master of the common

law, as well. Two intensive years of unremitting labor led to completion of the project. Then, at the very end of his task, his manuscript was totally destroyed by fire. Unhappy, but indefatigable, and with unshaken faith in the need for his code, Livingston immediately started afresh and produced the voluminous works that we possess. His code was never adopted. But, if the judgment of gifted contemporaries be valid criterion, the work that roused the unbounded praise and enthusiasm of Bentham, Hugo, Kent, Story and Marshall must have been of the rarest quality, indeed.

His System of Penal Law has five divisions: A Code of Crimes and Punishments, A Code of Procedure, A Code of Evidence, A Code of Reform and Discipline, and A Book of Definitions. At the outset, and frequently later, he declared that "no act of legislation can or ought to be immutable." So, too, if we wish to understand his work we must strive to read it in light of the problems of over a century ago, as well as against the background of the then-prevalent philosophies.

The most remarkable feature of the Code of Crimes and Punishments is the "total abolition of capital punishment."<sup>4</sup> Fully aware of universal opposition (all the states were then retaining the capital penalty) he summoned his greatest powers of analysis and persuasion, and presented an argument that has never been surpassed. Brilliantly he endeavored to establish the ineffectiveness of capital punishment as a deterrent of crimes of strong passion; the greater effects of life imprisonment; its destruction of the public sensibilities; the avoidance of the prescription by jurors and witnesses; and the unfortunate experience of communities that inflicted the penalty in comparison with two or three others, where, for a time, it was abolished, showing, he concluded "not only that it fails in any repressive effect, but that it promotes the crime" (murder).<sup>5</sup> His analysis and the reform he so eloquently urged caught the imagination of scholars and humanitarians the world over; and none can say how great an effect his report has had nor when his masterly appeal may again inspire complete reexamination of the problem.

It is possible merely to touch upon a few of the other salient features of the Code of Crimes: No child under nine could be convicted of any crime. A married woman who committed a crime under command or persuasion of her husband, was to receive one-half the penalty otherwise provided. The punishment for a second offense was to be increased by half; and one who had twice been convicted of a crime, was, upon a third conviction, to be imprisoned at hard labor for life. He would exempt close relations from liability as accessories after the fact. Contempt of court was rigidly curtailed. Strikingly novel were offenses against the liberty of the press, which included even legislation to restrain the right. Adultery was made criminal, a wife being punished more severely than a husband. Assaults on officers carried double punishment as did assaults by men against women, and wards against tutors. Murders were divided into four ascending grades: infanticide, assassination, murder under trust, and parricide. Suicide was made not criminal. And it was made a conspiracy to combine to raise or, and this was not in the English statute nor yet, I believe, in American jurisprudence, to reduce wages—the penalty for employers being imprisonment, that for employees, imprisonment or fine.

Livingston's Code of Criminal Procedure was prob-

2. Claiborne, *Official Letters*, etc.

3. *The Complete Works of Edward Livingston on Criminal Jurisprudence* (1873) vol I, p. 1.

4. *Id.* I, 224.

5. *Id.* I, 201.

ably much more truly prophetic. He deplored the disregard of preventive remedies; and though his plan for reward of informers has not found legal sanction, his provisions for enlistment of public cooperation by honorary rewards, for early education, and for relief of economic insecurity challenge contemporary scholarship to reconstruct the traditional coercive legal apparatus and provide theory and instrumentality for prevention of criminal behavior.

His proposals regarding the preliminary magisterial hearing have but recently been adopted, and in certain important matters he is still leading the way. To avoid tricking the accused, the magistrate's examination was to be limited to specified questions; the answers were to be recorded, corrected, signed by the accused, and transmitted with the record, to the trial court. The accused, being protected from catch-questioning, must have his refusal to answer militate against him.

In matters of simplification of pleading, Livingston was a full century in advance of his time. Here, especially, his linguistic bent, inspired probably by Bentham, found an apt sphere of application. The classic story of his informing a newly arrived and apprehensive practitioner that he could learn all the rules of Louisiana pleading in the course of a dinner's conversation is some indication of their simplicity. After conviction, no judgment was to be arrested for any defect save failure to allege a crime. A rather unique proposal was provision that the defendant was to present the closing argument.

From a political point of view the sections on *habeas corpus* and jury trial are most significant. By requiring the magistrate to issue a warrant for the prisoner, he sought to avoid circumvention of the writ by police officers. All offenses were to be tried by jury; but any number agreed upon, less than twelve, could try a misdemeanor. Unanimous verdict was required.

The originality of the Code of Evidence may be seen from such provisions as the following: where one is convicted because of the unjust operation of the rules regarding admission or exclusion of evidence, the court is directed to report to the legislature and withhold judgment until the end of the session, when, if the code is altered, a new trial must be granted; the refusal to exclude the testimony of husband or wife, for or against the other; and the abolition of the rule denying a party the right to discredit his own witness either by cross-examination to test veracity, or by calling character witnesses.

The Code of Reform and Prison Discipline is in some respects the most remarkable of all. Throughout, the objective was prevention of crime through "restraint, example and reformation." Where prisoners were indiscriminately mingled, including even, in those days, persons awaiting trial, the grossest contamination resulted. Livingston advocated careful classification and segregation of typical groups. He worked out a detailed program to include not only treatment of the criminal but also support and training of the economically submerged. To appreciate the sweep of his constructive imagination, it may be recalled that even at Auburn which was one of the most progressive of American penal institutions, treatment was characterized by solitary confinement, absolute silence, and unrestrained, frequent use of the lash by the turnkeys.

Livingston advocated a system of education that would give instruction in the duties of the citizen to-

wards the state, towards each other, and in those principles of religion that were common to all sects.

He proclaimed as an axiom that "political society . . . owes necessary subsistence to all those who cannot procure it for themselves."<sup>6</sup> To this end he would establish a House of Industry where, in one department, those who desired would be given employment, and, in another department, vagrants and able-bodied beggars would be forced to work. These latter, arrested at an early age and taught to be industrious, would, he believed, remove a prolific source of criminality. In the jail, offenders were to be subjected, according to the moral turpitude of their offenses, to various degrees of imprisonment, labor, and solitude. To the improvement of housing conditions, sanitation, the education and comfort of prisoners, Livingston made many notable suggestions. And he sought to provide for the reestablishment in society of discharged convicts by throwing open to those unable to find employment, the facilities of the House of Refuge and Industry. As to juvenile offenders, the place of confinement was to be "a school of instruction rather than a prison for degrading punishment."<sup>7</sup> Finally he emphasized the importance of personnel in penal institutions, and provided for a board of inspectors to be liberally remunerated. All of these projects were not novel, but, as he stated, "they had never before been consolidated and presented as component parts of a whole system."<sup>8</sup>

The basic philosophic tenets upon which Livingston constructed the above codes were utilitarian, individualistic, and humanitarian.

To understand the Utilitarianism which the Livingston codes represent, one must look back a full century before he wrote. The intellectual origins were diverse. There was the hedonistic ideology which Gay in 1730 reestablished as a basic philosophic viewpoint. Next, and at least equally distinctive, was the prestige of Newtonian mechanics, which, like relativity at present, influenced all departments of thought. Professor Hutcheson of Glasgow, a forerunner of Hume and the teacher of Adam Smith, was among the first to suggest application of exact scientific method to "moral science." In 1738 Hume proposed the introduction of the experimental method into moral subjects, and he applied the idea of Newtonian attraction to psychologic association, arguing that mental phenomena were mutually attractive and in causal interrelationship. This conception was pushed further in 1749 by Hartley who superadded the principle of contiguity and drew close analogies between mental phenomena, thus viewed, and physical attractive forces. In France, Helvetius, to whom Bentham fervently expressed his profound debt for the suggestion of a science of legislation, also "wished to treat morals like any other science and to make an experimental morality like an experimental physics"; and he argued that "there exists a pedagogic art of inspiring and ruling the passions whose principles are 'as certain as the principles of geometry.'"<sup>9</sup> Helvetius' writing was taken up by Beccaria, who emphasized, naturally, the mathematical claims of the new moral science, formulated the principle of "the greatest good to the greatest number," and applied the utilitarian ideology to crime and penal law.

Bentham who became the recognized fount of util-

6. *Id.* I, 528-9.

7. *Id.* I, 573.

8. *Id.* I, 586. For very interesting comment, see *Two Letters of Chancellor Kent* 12 Am. L. Rev. 479.

9. See Halévy, *Philosophical Radicalism in the 19th Century*.

itarianism, must be read against these intellectual and cultural movements. And it is little exaggeration to state that Livingston was Bentham's ardent disciple. He referred to Bentham as "the man who has thrown more light on the science of legislation than any other in ancient or modern times,"<sup>10</sup> "a man to whom statues would be raised if the benefactors of mankind were as much honored as the oppressors of nations,"<sup>11</sup> and as "a most profound writer on this subject" (evidence).<sup>12</sup>

Livingston's insistence upon the statement of reasons in support of the provisions of any code, his distinction between immediate and remote means of preventing offenses, his eloquent appeal to address the people "in the language of reason," and to invite them "to obey the laws by showing that they are framed on the great principle of utility,"<sup>13</sup> his deliberate avowal that he has "taken . . . utility for the sole object of [his] provisions,"<sup>14</sup> that "in affixing punishments, we should compare the evil of the offense with that necessarily caused by the punishment, and decide as the balance shall incline"<sup>15</sup>—here and throughout we see clear indications of a major intellectual influence upon the leading American exponent of 19th century utilitarianism in law.

The bent for mathematical precision and application of exact scientific thought in social disciplines characterized the Classical School in penology. We see this predilection—a still prevalent one—in Livingston's assignment of specific penalties (fines and years of confinement) to a carefully dissected mass of criminal offences. Thus, the penalty for second convictions was an addition of half to the punishment otherwise prescribed.<sup>16</sup> A fine must never exceed one-fourth of the value of the property of the offender.<sup>17</sup> Fines of public officers bore a certain proportion to income; fines for bribes were fixed in proportion to the value of the bribe. Typical was the provision that:

"Where negligent homicide in the second grade has been committed, in the doing or the attempt to do an act which is an injury, but not an offence, one-fifth shall be added to the punishment. If the act done or attempted, be a misdemeanor, but not an offence against the person, one-fourth shall be added. If it be one of those designated as an offence against the person, but not one of those offences designated as murder, one-half shall be added. If it be a crime punishable with imprisonment at hard labour for any term less than life, the punishment shall be doubled, and the imprisonment shall be at hard labour. And if the act be done or attempted to be done, be a crime punishable with imprisonment for life, the homicide shall be punished by imprisonment at hard labour for life."<sup>18</sup>

Livingston's Classicism should not be evaluated in the light of subsequent knowledge. Nor can it be understood except when viewed as a revolt from the indiscriminate cruelty of the preexisting English law.<sup>19</sup> This insistence upon exact penalties must be considered in conjunction with the humanitarian sentiments that supplied the intellectual fuel to motivate application of the prevalent scientific ideology to crime and law.

The humanitarian movement received great im-

petus from the publication in 1764 (the year of Livingston's birth) of Beccaria's epoch-making booklet. In England the work immediately stimulated in penology the spirit that moved in many fields. John Howard, Elizabeth Fry, Samuel Romilly and Fowell Buxton carried the torch of humanity into the prisons and the parliaments. Livingston's attempt to abolish capital punishment completely and his program for peno-correctional reform are outstanding instances of the deep humanity that guided him throughout.

Humanitarianism fused also with idealist individualism—the latter being represented by laissez-faire, by political guarantees against executive abuse, and by the reformulation and intense avowal of natural rights. Livingston's most sensitive years were molded by this thought. Members of his family helped initiate the Revolution and his sister's husband died on the field; they joined in the Declaration of Independence; they were among the first to fill important places in the judicial and legislative branches of the new government. He could not be other than an ardent exponent of individual rights and interests.

His insistence upon protection of the individual from possible governmental oppression is strikingly apparent in the codes. He sought to check official discretion rigorously, not because offenders escaped but because the innocent might be caught in the web of "constructive crime," and "ex post facto laws."<sup>20</sup> His advocacy of trial by jury is one of the most eloquent ever made, and instructive, too, if one have an eye to the relationship of procedure to philosophy, and to the historical relativity of political institutions. His proposals to make *habeas corpus* more effective, his rather visionary plans to insure liberty of the press by making interference with it criminal—even when such interference was by the legislature itself—these and many other provisions were logical deductions from individualistic premises immortalized by the Revolution, and adopted by Livingston as axioms of practical behavior in every realm.

We need to study Livingston because he provides us with the only detailed analysis in English of many of the problems involved in penal code making, coupled with application of the analysis made. His thought illuminates our own, even though we have made considerable progress in the social disciplines during the past century, and are therefore better equipped for penal legislation.

We cannot here make an analysis of the problems involved in the construction of a modern penal code.<sup>21</sup> But we may briefly examine certain problems which Livingston analyzed, and which, restated in a somewhat newer terminology, will necessarily engage our close attention if we take up the legal needs of our times in

ery that would disgust a savage . . . No proportion was preserved between crimes and punishments. The cutting of a twig, and the assassination of a parent; breaking a fishpond, and poisoning a whole family or murdering them in their sleep, all incurred the same penalties; and two hundred different actions, many not deserving the name of offences, were punishable by death." Livingston, *Works* I, 12.

Cf. the writer's *Theft, Law and Society* (1935) pp. 97ff. 20. "Everywhere, with but few exceptions, the interest of the many has, from the earliest ages, been sacrificed to the power of the few. Everywhere penal laws have been framed to support this power; and those institutions, favorable to freedom, which have come down to us from our ancestors, form no part of any original plan, but are isolated privileges which have been wrested from the grasp of tyranny." Livingston, *op. cit.* *supra*, I, 54.

21. See the writer's forthcoming article, *Criminology and a Modern Penal Code* (1936).

10. *Op. cit.* *supra* footnote 3, I, 155.

11. *Id.* I, 209.

12. *Id.* I, 426. And see vol. 11. *Works of Bentham* (Ed. by Bowring) at 23, 35, 37, 51 for correspondence with Livingston.

13. *Id.* I, 175.

14. *Id.* I, 87.

15. *Id.* I, 236.

16. *Id.* II, Art 52, at 24.

17. *Id.* II, Art. 90, at 33.

18. *Id.* II, Art. 532, at 144.

19. "Executions for some crimes were attended with butch-

anything like the spirit which guided this scholar of the last century in his unaided studies.

Like other cultural manifestations, the laws of any time and place more or less reflect current prevalent philosophic views—even to the point of their inherent inconsistencies. I have stressed the philosophical bases of Livingston's work because it seems to me that such influences are unescapable conditioning factors. If that be true, it is delusive to imagine that we can prepare a code which will suffice for all time. Livingston's understanding of these limitations upon his own codes, led him to espouse Bentham's plan of flexible legislation. He would have the courts constantly report their experiences to the legislature together with recommendations. In part, his program resulted from antipathy towards judicial legislation, legal fictions, and constructive offenses. But there is also some dawning recognition of the limitations necessarily placed upon courts, as constituted, to conduct empirical researches regarding social problems involved in adjudication. Hence he nourished Bentham's recommendation of a Ministry of Justice, which has found rather wide support in recent years among American scholars. The term, "Ministry of Justice" is, however, rather unfortunate because it suggests the continental method of political supervision and control of judiciary. As a permanent research organization, the plan offers abundant prospect of coordination of the judicial and legislative organs of government, and of sounder operation of both. Thus, recognition of the relativity of current philosophic views—at least as they appear in their specific forms and terminologies—carries the implication that research is an endless quest, as is the perennial readaptation of laws to meet new social problems.

Equally fundamental are the methods of research. The epistemological problems here involved, deserve detailed analysis.<sup>22</sup> But we may with profit examine Livingston's methods. If we read Beccaria and then turn to Livingston, we see at once in the latter, a great diminution in reliance upon given abstract principles and a marked tendency towards empirical research. It is true that we find language that smacks of the earlier rationalism, e.g., the statement that with certain "rules constantly before us . . . we can proceed with confidence and ease, to the task of penal legislation; and we may see at a glance, or determine by a single thought, whether any proposed provision is consonant to those maxims which we have adopted as the dictates of truth;"<sup>23</sup> and that "provided [a code] contains the true principles of legislation . . . every future law will be measured by their standard. Then no more discordant provisions; no more vacillating legislation; . . . none of those evils, in short, which are contrary to these principles."<sup>24</sup> But such generalization is rare; and there are numerous acute observations that indicate complete awareness of formal and terminological difficulties. Indeed he regularly proceeds to reconcile and apply his principles in the light of his experience, and he reaches highly persuasive conclusions. Much more significant is Livingston's deliberate and frequent use of empirical data. He sought to avail himself "of the advantage which those experiments [other states' penitentiary systems] afforded," and "to know, with precision, their results." "This information," he continues, "could only be obtained by collecting the returns and official reports of the different establishments, and inducing men of eminence and abilities to communicate

their observations on the subject."<sup>25</sup> He therefore sent out "circular letters" (questionnaires).<sup>26</sup> In his study of capital punishment, he sought to eliminate bias, to achieve what we are wont to call "objectivity." "I strove," he writes, "to clear my understanding from all prejudices which education or early impressions might have created, and produce a frame of mind fitted for the investigation of truth . . . [and] endeavored to procure a knowledge of the practical effect of this punishment on different crimes in the several countries where it is inflicted."<sup>27</sup> He argued that "the result is capable of being demonstrated by figures,"<sup>28</sup> and he attached statistical tables. But he was hampered by the "want of authentic documents" which prevented him from presenting "facts which would elucidate the subject by examples from the records of criminal courts in the different states. The prevalence of particular offences, as affected by the changes in their criminal laws; the number of commitments, compared with that of convictions; and the effect which the punishment of death has on the frequency of the crimes for which it is inflicted; accurate information on these heads would have much facilitated the investigation in which we are engaged."<sup>29</sup> He searched for "sufficient data"; he examined English and other statistics.<sup>30</sup> He proposed to engage in field work by devoting "a few months of the summer to a personal examination of the different institutions of the kind [penal] in the Atlantic states."<sup>31</sup> He desired that reports be made "of all causes that are tried, and all points of law that are determined in the court, and to publish them at stated times, and to make regular returns of all commitments, accusations, indictments, informations and trials, in such form as to give every desirable information of the state of crime and criminal jurisprudence in his district. These returns are to be made to the governor, to be by him laid before the legislature. A mass of information will thus be collected which will be of the utmost value in future legislation."<sup>32</sup> He constructed partial mortality tables showing the number of persons committed for trial, tried, convicted, discharged or acquitted.

In recent years we have, to be sure, become more critical of propositions proposed as premises, more insistent upon the application of narrow generalizations, to be tentatively accepted as hypotheses, and held valid only in so far as supported by empirical data. We have by analysis and experiment become thoroughly conscious of methods, more specific in the recording of data, more cautious in generalizing from them. And we have almost undreamed-of facilities for carrying on large-scale research. In our further advance in these directions, we must not forget the persistent rational use to which Livingston subjected all available data, without which fact-finding is a blind and pointless effort, nor the modernity of his approach. Unfortunately lack of data and facilities made it impossible to construct his codes upon the results of scientific research. One man was research organization, draftsman, lawyer and publicist. His great accomplishment, scientific progress in the ensuing century, and our vastly increased research facilities should encourage present endeavor.

Sound legislation depends not only upon analysis

25. *Id.* I, 7.

26. *Id.* I, 8.

27. *Id.* I, 35.

28. *Id.* I, 199.

29. *Id.* I, 48.

30. *Id.* I, 49.

31. *Id.* I, 73.

32. *Id.* I, 402.

22. *Cf. ibid.*

23. Livingston, *op. cit. supra* footnote 3, I, 10.

24. *Id.* I, 229.

of prevailing philosophies and upon scientific research but also upon the formulation of adequate word symbols to denote the empirical generalizations discovered. This problem is a linguistic one, and, in law, a largely technical one as well. Modernization of legal language means the construction of symbols which adequately refer to existing fact situations and to present knowledge regarding them. It will call also for the elimination of useless technicality, and of ambiguity and redundancy.

To these latter ends Livingston made valuable contributions. He sought assiduously to avoid every unnecessary technical term, and to provide explanations for such terms in his *Book of Definitions*. He argued that ambiguity and vagueness perverted the judicial function from ascertainment of the facts and application of the rules, to declaration and interpretation of the law.<sup>33</sup> Hence clarification and precision "more than any other," called for his "closest and intensest attention."<sup>34</sup> We have in recent years discovered that the language problem is much more complicated than has hitherto been thought. But no draftsman will fail to benefit from Livingston's refreshing, persistent attempts to eradicate ambiguity, vagueness, and outmoded technicality from the law.

There remain to be considered, certain special problems in regard to codification. Here Livingston preceded Field, and his analysis ran deeper and in broader channels. Livingston was a keen critic of the common law, and his lack of bias is apparent from his unstinted praise of the political guarantees and safeguards provided by English law.<sup>35</sup> He deplored the uncertainty of the common law; the fact that it cannot be known until a case arises for its application, when it is established not by the legislature but by the courts,<sup>36</sup> the difficulty of distinguishing old statutes from common law; inaccurate reporting and consequent confusion; the injustice and absurdity that adherence to precedent frequently produces; the voluminous literature which imposes an absolute physical limitation upon its comprehension.

Some of his criticism was occasioned by the fact that, at that time, three-fourths of the Louisianians did not read English, and were, for other reasons, also opposed to the introduction of the common law. Besides, his concern for the safeguarding of the individual from governmental oppression, combined with his inheritance of the Jefferies' tradition of judicial persecution,<sup>37</sup> led him to fear and to oppose judicial legislation. The English had "seen their fellow subjects hanged for constructive felonies; quartered for constructive treasons; and roasted alive for constructive heresies."<sup>38</sup> Hence Livingston sought to restrict the judge to the law, and

to statement of the evidence only when requested by the jury.<sup>39</sup> "Judges," he said, "acquire a habit . . . of taking a side in every question they hear debated. . . . neutrality cannot . . . be expected, . . . In the theory of our law, judges are the counsel for the accused, in practice they are, with a few honourable exceptions, the most virulent prosecutors"<sup>40</sup> He sought, too, to limit rigorously the sentencing power of the judge, although he did provide a sphere of individualization. And indeed his code was not as restrictive of judicial discretion as some of his remarks might lead one to expect.<sup>41</sup> But his general opposition to official discretion led him to oppose it also in peno-correctional treatment, thinking it "unsafe to adopt a system that must depend entirely for its success on the personal qualities of the man who is to carry it into effect."<sup>42</sup>

Livingston believed that legislation might be as incongruous, complex, and unwieldy as the common law.<sup>43</sup> He held that a code, amended frequently, would remove the deficiencies of the common law. A code would provide fixed principles and systematization of rules, not otherwise attainable. The judges would rely upon "grammatical construction; the context of the law, the signification usually given to the words employed, or their technical meaning in reference to the subject matter."<sup>44</sup> But they must follow the "plain import of the words," and must not say "that the law means more, sometimes less, than the legislature intended."<sup>45</sup> His insistence upon constant amendment must be considered as supplementary, and as a preventive of inflexibility. The problem promises to become increasingly important. Indeed, we find such a common law scholar as Mr. Wilshire, in his preface to the fifteenth edition of Harris' *Criminal Law*, stating: "The mass of new legislation has made it necessary to increase to some extent the size of the volume, and, unless some steps are taken in the direction of codification, it will soon be impossible to produce a work of this character which will be of any value."

Unfortunately, early legal training, tradition, and, perhaps even, vested interest, give rise to predilection and bias, not to impartial study of the problems involved. Certainly a minimum desideratum is painstaking investigation of the operations of code systems of penal law.

Even though a penal code be rejected or deferred, there will remain the insistent need to improve penal legislation. Perhaps it will be possible to effect a sound synthesis of various legal materials and methods; or to employ particular techniques with reference to the needs of the specific problems dealt with in the various fields of law. In any event it is clear that cultivation of a science of legislation is a paramount need of our times. If that be true, Livingston's notable contributions must be the starting point of present endeavor in the criminal law, at least. If his breadth of scholarship can be joined to the vastly greater research facilities which we enjoy, the most pressing legal needs of contemporary society will be abundantly supplied.

33. *Id.* I, 178, 179.

34. *Id.* I, 228-30. His solution of the difficulties presented by the rules on forgery are especially suggestive for several other problems resulting from the accumulation of numerous highly refined concepts and a judicial technique which requires identification with one of them (*Cf. id.* I, 279). He proposed to state simply "an instrument in writing, of which a copy is attached," instead of designating it a note, or bond, or bill, etc. (*Id.* I, 376).

35. He relied very considerably upon the common law for his code-e.g., "The numerous cases in the English law on this subject (murder) were studied, and all those principles drawn from them which could give precision to the rules that are laid down." (*Id.* I, 306).

36. *Id.* I, 88ff.

37. "It will not be denied that England has suffered the most cruel evils by this exercise of judicial power . . . we may, hereafter, have a judge who may exercise his constructive ingenuity upon murders or burglary, or other offences, as Jefferies did upon treason." *Id.* I, 232.

38. *Id.* I, 13.

39. *Id.* I, 69.

40. *Id.* I, 70.

41. *Id.* I, 60, 362-3, 397.

42. *Id.* I, 521.

43. *Id.* I, 11, 135.

44. *Id.* I, 180.

45. *Id.* I, 231.

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# THE PROPOSED UNITED STATES ADMINISTRATIVE COURT

Imperative Need of Provision for Review of the Facts of Any Controversy with the United States, Absolutely Independent of the Department or Other Federal Agency under Which the Controversy May Have Arisen—Recent Legislative History of Subject—Important Provisions of the Pending Senate Bill—Opinions of the Bar Desired

By COL. O. R. MCGUIRE

*Chairman of the Association's Committee on Administrative Law*

THE Committee on Administrative Law, since its creation early in 1933, has filed two rather exhaustive reports—one at the annual meeting of the American Bar Association in 1933 at Grand Rapids and the other at the 1934 meeting in Milwaukee. A third report had been largely prepared for the 1935 meeting in Los Angeles when certain opinions, were handed down by the Supreme Court of the United States to the effect that there were certain unconstitutional delegations of legislative power to the administrative branch of the Federal government and there was insufficient time within which to revise the report in order to have it printed and filed. However, the then able chairman of the Committee and now one of its valued members, Louis G. Caldwell, made a verbal report for the Committee to the Association.

Since the Los Angeles meeting of the Association, the members of the Committee have held two sessions in Washington and there has been considerable correspondence in the meanwhile between the chairman and the various members of the Committee. In addition, certain professors of Administrative Law have assigned to their graduate students topics for research, in part satisfaction of the requirements for doctor's degrees, having to do with various aspects of the administrative problem in the Federal field. This work has been quite helpful and we hope to make it available to the members of the legal profession. In addition, there have been some conferences between the President of the Association and the chairman of the Committee and he has consulted with a number of the members of the Executive Committee.

The foregoing statements are made as an indication to the members of the Association that the Committee on Administrative Law has devoted considerable time and study to its work ever since the creation of the Committee in 1933, and, that it may not be overlooked, mention should be made of the fact that the energy and ideas of former members of the Committee, Messrs. Butler, Frankfurter, Gay, Handler, and Rugg have contributed largely to whatever success the Committee may have attained in carrying out the mandate given it by the Association.

The only part of the work of the Committee which I intend to discuss at this time is that part which pertains to devising machinery for the purpose of securing review of the facts of any controversy with the United States—not involving foreign relations or the conduct of the Army and Navy in time of war—absolutely independent of the department, establishment, board, commission, or other agency of the Federal government under which the controversy may have arisen. The need for such independent review

of the facts, with final test of the law in the Supreme Court of the United States if necessary, has been pointed out in the annual reports of the Committee on Administrative Law, adopted and approved by the Association, and I need not repeat such statements herein.

There are a large number of administrative officers and tribunals of various kinds operating in the Federal government making findings of facts and determining controversies. In some instances there may be a review of both the findings of facts and the conclusions so reached; in other instances, the conclusions may be reviewed but not the findings of facts; and in the remaining instances there is no review of either the findings of facts or the legal conclusions therefrom. Also, some of the legislative courts or tribunals making such reviews when authorized, are overburdened with work and others have much less work to perform. Obviously, in the interest of efficiency and a fair division of the work, the reviewing tribunal should be sufficiently flexible so that the individual judges may be shifted from one class of work to another as the volume and character of cases may require.

Based upon this general principle, Senator Norris, then chairman of the Senate Committee on the Judiciary, introduced a bill to consolidate certain of the reviewing agencies, such as the Court of Claims and the Court of Customs and Patent Appeals into an administrative court and to transfer to it jurisdiction now possessed and exercised by the courts of the District of Columbia in mandamus and injunction proceedings against Federal officials and the jurisdiction now possessed and exercised by the various United States Circuit Courts of Appeal in reviewing the Board of Tax Appeals. Senator Norris made an address on the floor of the Senate, outlining in a general way, the purposes of the bill—at which time he stated that he had no intention of requesting action on the bill at that time, his purpose being to call the attention of the country to the need for such a law and to permit the legal profession to study the proposed reform.

This action was called to the attention of the Association in an article which the writer published in this Journal in August, 1933 and at the same time, he called attention to the fact that in a subsequent Congress, Senator Logan of Kentucky, who later became a member of the Senate Committee on the Judiciary, had taken up the proposed reform where Senator Norris had left it and had introduced a somewhat more elaborate bill. The writer was fortunate enough to have been able to lend some little aid to

both of these able Senators in this undertaking and I may say for the information of the members of the Association that both of these Senators, and others with judicial experience before entering the Senate, have been most helpful and sympathetic to recommendations made by the Committee on Administrative Law.

Thus the study on the part of certain Senators and of the Committee on Administrative Law has extended over the course of several years and on January 22, 1936, Senator Logan reintroduced his bill, bearing the number S-3787, which represents considerable revision over the original Norris bill or the first Logan bill. The interest in the bill has been very great on the part of members of the bar and business concerns, so great, in fact, that the supply of the bill has been exhausted though the writer was successful in having sent to the officials of the American Bar Association copies of the bill before the supply was exhausted. It is printed in part as a footnote to this article for the information of the members of the bar for whom it is not possible to secure copies of the bill.<sup>1</sup>

It will be noted that S-3787 proposes to absorb into an Administrative Court the existing Court of Claims jurisdiction and its five judges; the existing Court of Customs and Patent Appeals jurisdiction and its five judges; the existing Customs Court and its nine judges; and the existing Board of Tax Appeals and its sixteen members, or a total of thirty-five members with authority in the President to appoint a chief justice and four additional members—making an Administrative Court of forty members, divided into trial and appellate divisions. All the judges are to have tenure during life or good behavior, subject to retirement under the same conditions as those for the retirement of other Federal Judges. Such a provision is necessary in order to secure that independence of action so necessary in a judge, and as the judges of the Administrative Court do not perform executive duties, the Congress may constitutionally restrict the Executive right to remove them from office.

This proposed court will not only absorb the jurisdiction now possessed and exercised by the tribunals merged into the court, but it will absorb the jurisdiction now possessed and exercised by the courts of the District of Columbia in mandamus and injunction proceedings against Federal officials at the seat of Government. The reason for such transfer is that these cases should be heard and determined by a Federal court having jurisdiction over the merits of controversies with the United States with, presumably, more or less familiarity with the principles of law involved. They should not be heard by a local District of Columbia court along with the mass of heterogeneous cases heard and determined by that court. Moreover, petitions for mandamus and bills for injunctions may involve the work of some important department or establishment of the Government and they should be heard by judges skilled in Federal law rather than by a judge, as is now the case, preceding or following motions for increase in alimony and other local litigation.

The Administrative Court would likewise absorb the jurisdiction now possessed by the ten circuit courts of appeal and the court of appeals of the District of Columbia in reviewing decisions of the Board of Tax Appeals. It will likewise absorb the existing jurisdiction of district courts in suits against the United States and collectors of internal revenue to recover taxes. This transfer of jurisdiction in tax matters is very

necessary in order to relieve the Supreme Court of the United States from the immense burden now thrown upon it in attempting to reconcile the decisions of eleven courts of appeal and the Court of Claims in tax cases. There are now comparatively few suits against the United States or collectors in the district courts to recover taxes and the reform of concentrating the hearing of all tax cases in trial an appellate division in one court follows the reform found necessary in making a similar concentration more than thirty-five years ago in customs cases.

A most important section of the bill is that which would invest in the Administrative Court the jurisdiction now possessed and exercised by many administrative agencies to revoke licenses, permits, registrations, and other grants for regulatory purposes. The classes of such cases are stated in section 6 of the bill and they are very important from the standpoint of the citizen engaged in an attempt to earn a livelihood and conduct his business which it may be necessary to regulate in the public interests through use of license, registrations, etc. If the administrative agency of the government concerned should conclude that the permit, license, registration, etc., should be revoked, the bill provides that such agency of the Government must proceed by a petition filed in the Administrative Court and a trial had upon the facts and law as to whether there should be a suspension or revocation of the registration, license, permit, etc. In many of such cases there is now no authority of law whatever for any such independent review of the facts and the law, the action of the administrative agency being final or if there is some provision for review in the courts, such review is often inadequate because the facts determined by the revoking authority are usually accepted as final.

It is a fact that administrative officers of the government are too frequently selected on the basis of political service rendered to the party in power rather than for legal training, judicial poise, and fitness for the performance of the duties of the particular office. It is a rare case indeed where a career man—one who has entered the ranks of Federal employees via the Civil Service route—and who is trained in the work of the particular bureau or office is permitted to rise to the head of his office and in this respect our Federal service is unlike that in England, for instance, where the clerk may look forward to promotion in the course of time to the highest positions in his particular service. The practice followed very generally by both political parties in this country is to ignore the Civil Service man of ability in filling the more responsible Federal offices for the reason that his long period of Federal service has broken whatever political ties he may have had in his home State and he is prohibited by law from taking an active part in partisan politics after his entry into the service. Few lawyers or business men care to submit to a political appointee of the hour the final conclusion as to whether a license, permit, registration, etc., to engage in an honest business shall be revoked. Like Caesar's wife, the Federal government must be above suspicion in its conduct.

It will be noted that the Administrative Court is divided into trial and appellate divisions and these are in turn subdivided into sections—the personnel of the appellate and trial divisions being stated in the bill and the personnel of the trial and appellate sections being subject to assignment by the chief justice, so as to secure as great a degree of flexibility as may be

necessary to meet the state of the trial and appellate dockets of the court. The trial customs section is to remain in New York City where the bulk of the trial work arises in connection with the customs laws but the chief justice may draw from that section for other work such of the judges as may not be needed at the time in customs cases. Also, a customs judge sent to New Orleans, Chicago, Los Angeles, or Seattle, for instance, could be assigned to the hearing of other cases against the United States after he had finished his work on customs cases and thus there could be speeded up the work of hearing and determining controversies against the United States. Also, there would be a saving to its taxpayers.

The Administrative Court, in both its trial and appellate divisions and sections would be ambulatory and the sections could hold sessions in any part of the United States made desirable by the state of the docket, being in this respect similar to the Board of Tax Appeals and the Customs Court. Thus there would be brought to the lawyer and litigant an expert tribunal in the hearing and determination of controversies with the United States and would to that extent operate to decentralize the legal work now largely centralized in Washington.

Neither the American Bar Association nor the Committee on Administrative Law has approved and committed itself to this bill but it is expected that the bill will be on the agenda of the annual meeting of the Association in Boston. In the meantime it is hoped that the President of every State Bar Association will refer it to a trained committee with report back to the State Bar Association at such of the annual meetings as are held prior to the Boston meeting of the American Bar Association and that the chairman of the Committee on Administrative Law may be furnished with all comments and criticisms of the bill. Also, it is hoped that the members of the American Bar Association will make their own independent study of the bill in the light of the above explanations and the 1933 and 1934 reports of the Committee on Administrative Law and will furnish the chairman thereof with their comments and suggestions.

The situation is such that reform is imperative. The question involved is not a political one. No one party is responsible for the present condition of affairs. The time has come to quit talking about the situation and do something about it. Under the dynamic and able leadership of President Ransom and his Executive Committee we want to secure the consensus of opinion of the leading lawyers throughout the country and make such opinions available in effecting the needed reform. The Committee can not undertake to communicate with each member of the Association and so this message is sent to him via the columns of the JOURNAL.

#### FOOTNOTE 1.

#### TITLE I—UNITED STATES ADMINISTRATIVE COURT

##### SHORT TITLE

SECTION 1. This Act may be cited as the Administrative Court Act of 1936.

##### ESTABLISHMENT OF THE COURT

SEC. 2. There is hereby created a United States Administrative Court (hereinafter referred to as court), organized into divisions and sections as hereinafter provided and constituted as follows:

(a) The court shall be composed of a chief justice and not to exceed forty associate justices.

(b) The chief justice and, except as hereinafter otherwise provided, the associate justices shall be ap-

pointed by the President, by and with the advice and consent of the Senate. They shall hold office during good behavior, and may be retired as provided in section 714 of the Revised Statutes, as amended. The services heretofore rendered by the chief justice or by any associate justice on any other court or board herein abolished shall be deemed continuous services rendered under an appointment to hold office during good behavior within the meaning of that section.

(c) The chief justice shall receive a salary of \$15,000 a year, and each associate justice shall receive a salary of \$12,500 a year, payable monthly out of the Treasury.

(d) The following are hereby transferred to, and shall be, associate justices of the court:

(1) The present chief justice and judges of the Court of Claims;

(2) The present presiding judge and associate judges of the United States Court of Customs and Patent Appeals;

(3) The present presiding judge and judges of the United States Customs Court; and

(4) The present chairman and members of the Board of Tax Appeals.

(e) The chief justice shall preside over all sessions of the entire court and, unless he shall otherwise direct, at any hearing or other proceeding before the court or before any division or section thereof in which he shall participate. So far as the performance of his other duties permits, the chief justice shall also be deemed and shall perform the duties of an associate justice and as such shall be assigned by himself to one of the divisions of the court and to a section of that division, and shall be eligible for designation by himself as chairman of that division and presiding justice of that section.

(f) The chief justice may delegate his powers and duties under this Act with respect to either division to the chairman of such division and with respect to any section to the presiding justice of such section.

##### TRIAL AND APPELLATE DIVISIONS OF THE COURT

SEC. 3. The court shall consist of a trial division and an appellate division, each divided into sections as hereinafter provided, and to be constituted as follows:

(a) Each division shall consist of such number of associate justices as shall from time to time be fixed by the chief justice in such manner as in his judgment is best calculated to effect the expeditious administration of justice and a fair distribution of the court's work among its members. At no time, however, shall the trial division consist of less than twenty justices or the appellate division less than ten justices.

(b) The associate justices to constitute each division shall from time to time be designated by the chief justice with due regard for their several qualifications by way of experience, learning, and efficiency for the work of the division to which they are assigned. Whenever required by the work of the court, the chief justice may assign one or more of the justices constituting one division to temporary or part-time work in the other division. No justice who shall have participated in the hearing or decision of a case in the trial division shall participate in the hearing or decision of that case in the appellate division.

(c) The chief justice shall annually designate a chairman of the trial division and a chairman of the appellate division, respectively, from among the associate justices. The chairman of a division shall preside at all sessions of that division and shall perform such other duties with respect to that division as shall be delegated to him by the chief justice or prescribed by the rules of the court.

(d) The chairman of either division may delegate his powers and duties with respect to any section which is part of his division to the presiding justice of that section.

##### SECTIONS OF THE TRIAL AND APPELLATE DIVISIONS

SEC. 4. Each division shall consist of sections for

the hearing and determination of particular classes or groups of cases, to be constituted as follows:

(a) The number of such sections and the designations thereof, the classes or groups of cases to be heard and determined by each section, and the number of justices of which each section shall be composed, shall from time to time be fixed by the chief justice in such manner as in his judgment is best calculated to effect the expeditious administration of justice, a fair division of the work of each division among its members, and, so far as possible, the scientific handling of related cases by justices who are expert and experienced in the subject-matter thereof. At no time shall there be less than four sections in the trial division or less than two sections in the appellate division. No section in the appellate division shall consist of less than three members.

(b) The justices to constitute each section shall from time to time be designated by the chief justice with due regard for their several qualifications by way of experience, learning, and efficiency for the work of the section to which they are assigned. Whenever required by the work of either division, the chief justice may assign one or more of the justices constituting one section of that division to temporary or part-time work in any other section of that division, or may direct that particular cases or classes or groups of cases be transferred temporarily from one such section to any other such section.

(c) The chief justice shall annually designate presiding justices, one for each section, from among the associate justices (including the chairman) assigned to the division of which such section is a part. The presiding justice of a section shall preside at all sessions of that section and shall perform such other duties with respect to that section as shall be delegated to him by the chief justice or by the chairman of the division of which such section is a part or as shall be prescribed by the rules of the court.

(d) Pending exercise by the chief justice of his powers and duties under this section, the trial division shall consist of four sections, designated and constituted as follows:

(1) A claims section of five members, composed of the present chief justice and the four other judges of the Court of Claims, the said chief justice to act as presiding justice of the section.

(2) A customs section of nine members, composed of the present presiding judge and the eight other judges of the United States Customs Court, the said presiding judge to act as presiding justice of that section.

(3) A tax section of sixteen members, composed of the present chairman and the fifteen other members of the Board of Tax Appeals, the said chairman to act as presiding justice of the section.

(4) An extraordinary writs and license section of one or more members to be designated by the chief justice from among the associate justices appointed by the President, and the chief justice shall designate the presiding justice of that section.

(e) Pending exercise by the chief justice of his powers and duties under this section, the appellate division shall consist of two sections designated and constituted as follows:

(1) A claims, customs, and patent appeals section of five members, composed of the present presiding judge and the four associate judges of the United States Court of Customs and Patent Appeals, the said presiding judge to act as presiding justice of the section.

(2) A tax, extraordinary writs, and license appeals section of not more than four members, to be designated by the chief justice from among the associate justices appointed by the President, and one of whom shall be designated to act as presiding justice by the chief justice.

#### JURISDICTION AND POWERS

SEC. 5. The jurisdiction and powers now vested in and exercised by the United States Court of Customs and Patent Appeals, the Court of Claims of the United States, United States Customs Court, and the United States

Board of Tax Appeals are hereby transferred and vested in the court, to be exercised and administered by the appropriate division and section thereof, as the chief justice shall direct, subject, however, to the applicable provisions and limitations of law as now provided with respect to the powers, jurisdiction, and proceedings of each said court or Board. The jurisdiction and powers of the several District Courts of the United States over actions against collectors of internal revenue, or their successors, for the recovery of taxes, and over suits to enjoin the collection of taxes, ascertained and assessed, are hereby abolished, and the jurisdiction and powers to hear and determine all such suits or actions are hereby transferred and vested in the court. The court is also vested with the jurisdiction and powers now possessed and exercised by the Supreme Court of the District of Columbia in proceedings by extraordinary processes against officers and employees of the United States, excluding proceedings against officers and employees of the District of Columbia. The court is further invested with the jurisdiction and powers to review the action of any department, commission, or other establishment of the Government for refusing to admit any person to practice before it for suspension or disbarment of practice therein.

SEC. 6. The jurisdiction and authority now vested in the several departments, commissions, administrations, and other executive agencies of the Government over the revocation of licenses, permits, registrations, or other grants for regulatory purposes, including the suspension thereof to the extent that the same is now provided by law, are hereby transferred and vested in the trial division of the court, including, but not limited to, the jurisdiction and authority:

(1) Of the Commission (Secretary of Agriculture, Secretary of Commerce, and the Attorney General) to revoke the designations of boards of trade as "contract markets" (7 U. S. C. 8); and to revoke the privileges of persons to trade upon "contract markets" (7 U. S. C. 9);

(2) Of the Secretary of Agriculture to revoke registrations of market agencies and dealers engaged in buying and selling livestock at stockyards (7 U. S. C. 204); to revoke licenses of commission merchants, dealers, or brokers of perishable agriculture commodities (7 U. S. C. 449d(c), 499d(e), 499g(d)); to revoke licenses of cotton samplers (7 U. S. C. 51 (b)); to revoke licenses of cotton classifiers (7 U. S. C. 53); to revoke licenses of grain inspectors and graders (7 U. S. C. 80); to revoke licenses for the conduct of warehouses (7 U. S. C. 246); to revoke licenses for nonwarehousemen to accept custody of agriculture products; to revoke designations of bonded warehouses (7 U. S. C. 250); to revoke licenses to inspect, sample, classify, or weigh agriculture products (7 U. S. C. 253); to revoke certificates for the exemption of taxes on cotton ginning (7 U. S. C. 706); to revoke licenses of livestock inspectors (12 U. S. C. 1247); to prohibit the manufacture of renovated or processed butter upon finding the same containing matters deleterious or unwholesome to health (26 U. S. C. 995); to revoke licenses of dealers in live poultry (7 U. S. C. 218d); to revoke licenses of tobacco inspectors (7 U. S. C. 511m); to revoke licenses for the importation of milk or cream (21 U. S. C. 143); and to revoke licenses for the manufacture, importation, or shipment of viruses, serums, toxins, or analogous products for use in treatment of domestic animals (21 U. S. C. 156);

(3) Of local boards of inspectors (Commerce Department) to revoke licenses of pilots of small boats (46 U. S. C. 404); to revoke licenses of pilots of motor boats (46 U. S. C. 515); to revoke licenses of pilots of steam vessels (46 U. S. C. 214); to revoke licenses of masters, mates, engineers, and pilots of steam vessels (46 U. S. C. 239, 240); and to revoke certificates of inspection of steam vessels (46 U. S. C. 435);

(4) Of the Secretary of Commerce to revoke registration of aircraft, airlines, airmen, and so forth (49 U. S. C. 173 (f)); and to revoke licenses for salesmen from foreign countries (22 U. S. C. 247);

(5) Of the Postmaster General to revoke certificates of second-class mail privileges (39 U. S. C. 232); and to revoke mail privileges for the conduct of lotteries, gift enterprises, or schemes to defraud (39 U. S. C. 259);

(6) Of the Secretary of the Treasury to revoke licenses for the preparation and distribution of virtues, serums, toxins, antitoxins, and so forth, for prevention and cure of diseases of man (42 U. S. C. 146); to revoke licenses of customhouse brokers (19 U. S. C. 1641 (b)); to revoke licenses for the cartage of merchandise for warehousing (19 U. S. C. 1565); to revoke licenses covering transactions in foreign exchanges, transfers of credit, and export, hoarding, melting, or earmarking of gold or silver coin, bullion, or currency (12 U. S. C. 95, 95a); and to revoke licenses for the acquisition, importation, exportation, or transportation of silver (31 U. S. C. 316b);

(7) Of the Director of the Bureau of Mines to revoke licenses for the manufacture, sale, purchase, storage, issue, export, import, or analysis of explosives (50 U. S. C. 132, 133, and 134);

(8) Of the Commissioner of Internal Revenue to revoke licenses, permits, registrations, and so forth, to whatever extent such jurisdiction and authority exist by revenue statutes or regulations, including, but not limited to, the authority to revoke the following: Licenses for collection of foreign payments of interest or dividends; registrations for the production or importation of gasoline and manufacture or production of lubricating oil; registrations or producers, importers, manufacturers, compounders, dealers, and dispensers of narcotics; licenses for the manufacture of beer, ale, or wine; registrations of importers, manufacturers, or dealers in firearms, registrations of manufacturers of playing cards; registrations of persons or concerns engaged in effecting conveyances, stock and bond transfers, and so forth; registrations for manufacturing white phosphorous matches; registrations for the manufacture of tobacco, cigars, or cigarettes, for dealers in leaf tobacco, and for peddlers of tobacco; permits for distilling, rectifying, brewing, operation of bonded distillery warehouses, special bonded warehouses, and general bonded warehouses, and registrations for the operation of industrial or denatured alcohol plants and warehouses; to prohibit the manufacture of filled cheeses upon finding the same containing ingredients deleterious to health; and to prohibit the manufacture of oleomargarine upon finding the same containing ingredients deleterious to public health; and, by liquor-control statutes, to revoke permits of manufacturers of denatured alcohol, rum, or other articles (27 U. S. C. 154); and permits of manufacturers or dealers in denatured or industrial alcohol (27 U. S. C. 156);

(9) Of the President of the United States to revoke licenses to trade with the Indians (25 U. S. C. 263); to revoke licenses for trading with States or regions in insurrection (50 U. S. C. 208); to revoke licenses to lend or operate submarine cables (47 U. S. C. 35); and to revoke import privileges of inspectors, consignees, and so forth (19 U. S. C. 1337 (e));

(10) Of the California Debris Commission to revoke permits to engage in certain hydraulic mining (33 U. S. C. 678, 679);

(11) Of the Federal Communications Commission to revoke licenses for the use or operation of radio stations (47 U. S. C. 312); and to revoke licenses of radio-station operators (47 U. S. C. 303 (m));

(12) Of the Federal Power Commission and/or district courts of the United States to revoke licenses and/or preliminary permits for the construction, operation, and maintenance of dams, water conduits, reservoirs, powerhouses, transmission lines, or other navigation projects (16 U. S. C. 799, 806); and to revoke approvals of electric-power companies to issue securities (16 U. S. C. 824c);

(13) Of the Foreign Trade Zones Board to revoke licenses of grantees of foreign trade zones (19 U. S. C. 81r);

(14) Of the Securities and Exchange Commission to revoke registrations of national securities exchanges (15 U. S. C. 78s); to revoke registrations of securities (15 U. S. C. 78s); to revoke memberships upon national securities exchanges (15 U. S. C. 78s); to revoke the effectiveness of the registration statement of any registered security (15 U. S. C. 77h); to revoke registrations of holding companies (15 U. S. C. 79e); to revoke the effectiveness of registered declarations governing the sale of securities, and so forth (15 U. S. C. 79g); to withdraw approval of holding companies to acquire securities or assets of other interests (15 U. S. C. 79j); and to revoke approvals of mutual companies (15 U. S. C. 79m);

(15) Of the Tennessee Valley Authority to revoke agreements for the sale of power to municipalities or other political subdivision upon finding the price or resale thereof is unjust, unreasonable, and unfair (16 U. S. C. 831k);

(16) Of the United States Employees' Compensation Commission to revoke the authorization of any carrier to insure payment of compensation (16 U. S. C. 932);

(17) Of the National Munitions Control Board to revoke registrations and/or licenses of manufacturers, exporters, importers, or dealers in arms, ammunition, and implements of war (22 U. S. C. 245b);

(18) Of the Interstate Commerce Commission to revoke certificates for the operation of motor carriers, permits for the operation of contract carriers, or licenses of brokers of motor transportation (49 U. S. C. 312);

(19) Of the Federal Alcohol Control Administration to revoke permits of distillers, rectifiers, wine producers, or importers of intoxicating liquors or beverages (27 U. S. C. 204);

(20) Of the National Bituminous Coal Commission to revoke certificates of code compliances including rights to tax-drawback of coal producers (15 U. S. C. 809); and to revoke approvals of coal market agencies (15 U. S. C. 806); and

(21) Of the President or his designatee to deny certificates of clearances for the shipment of petroleum or petroleum products (15 U. S. C. 715d).

The jurisdiction and authority herein conferred upon the court shall be deemed exclusive of any other jurisdiction or remedy now authorized by law: *Provided, however*, That such jurisdiction and power shall not be deemed to embrace licenses or other grants for the regulation of proprietary matters of the United States.

SEC. 7. The jurisdiction of the court to revoke any license or other grant enumerated or otherwise included in section 6, shall be invoked upon petition of the particular department, commission, administration, or other agency of the Government, by which such license or other grant was issued, and the trial division of the court or the appropriate section thereof may in its discretion suspend any such license or other grant pending final hearing and determination thereon: *Provided, however*, That the authority to suspend any such license or other grant shall be limited to those cases where such suspension is now authorized by law. Where any license or other grant is suspended the case shall be concluded and decided as expeditiously as the business of the court will permit. After the effective date of this Act, when any license or other grant is suspended or revoked by any department or other establishment of the Government, the court is hereby authorized to hear and determine whether the jurisdiction and authority to issue such order of suspension or revocation has been vested in the court as herein or hereafter provided, and for this purpose the court is authorized to stay the operation of any such order until final determination by the court. Proceedings to stay the operation of such orders may be instituted by the person or corporation whose license or other grant was suspended or revoked. The court is authorized and directed to make provision in its rules and regulations for the conduct of all such suspension or revocation proceedings.

SEC. 8. Decisions of each section of the trial division shall be reviewable on appeal by the appropriate section

of the appellate division, as the chief justice shall provide or direct, and such review shall embrace all matters at issue appearing on the record, including both questions of law and questions of fact, except that any section of the appellate division, in its discretion, may permit or direct the taking of additional evidence relating to matters at issue on appeal. The decision of any section of the appellate division shall be deemed the decision of such division and shall be final, unless, within thirty days, the party of record adversely affected by a judgment of any such section files a petition for rehearing with the appellate division of the court, sitting en banc. Thereafter, as soon as the business of the court will permit the chief justice shall convene a court of seven associate justices of the appellate division, at least five of whom shall not have theretofore participated in the case, to hear and determine the petition for rehearing and shall have power to enter a judgment affirming, modifying, or reversing the decision of said section: *Provided, however*, That the review by the court sitting en banc shall be limited to questions of law appearing upon the record. The court's judgment in such cases shall be final, subject, however, to review by the Supreme Court of the United States upon petition for a writ of certiorari in the manner provided in the Act of February 13, 1925, as amended.

[The remainder of the bill deals with "Employees of the Court," certain "Miscellaneous Provisions" giving the Court power to prescribe form of its writs and other process, to promulgate rules and regulations for the conduct of its business, etc., and "Transfer Provisions" relating to cases pending in the Court of Claims and other tribunals affected by the Act.]

## Review of Recent Supreme Court Decision

(Continued from page 187)

of measures to that end and those who asserted the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an 'Appeal for the Liberty of Unlicensed Printing', assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties. Collett, *History of the Taxes on Knowledge*, vol. I, pp. 4-6. The act expired by its own terms in 1695. It was never renewed; and the liberty of the press thus became, as pointed out by Wickwar (*The Struggle for the Freedom of the Press*, p. 15), merely 'a right or liberty to publish without a license what formerly could be published only with one.' But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press."

Later, in 1712, in response to a message from Queen Anne, Parliament imposed a tax on all newspapers and advertisements.

"That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, Lennox and the Taxes on Knowledge, 15 *Scottish Historical Review*, 322-327. There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. In the article last referred to (p. 326), which was written in 1918, it was pointed out that these taxes constituted one of the factors that aroused the American colonists to protest against taxation for the purposes of the home government; and that the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies."

References were then cited to show that the purpose of the taxes was not to raise revenue, but to cur-

tail the dissemination of knowledge regarding governmental affairs.

"It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as 'taxes on knowledge' sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake; for, as Erskine, in his great speech in defense of Paine, has said, 'The liberty of opinion keeps governments themselves in due subjection to their duties.'"

The imposition was also cited of a stamp tax on newspapers in Massachusetts in 1785, and of an advertisement tax in 1786. Both met with such violent opposition, that they were quickly repealed.

The struggles in England and in Massachusetts were familiar to those who framed the First Amendment.

"It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief must be rejected in the face of the then well known purpose of the exactions and the general adverse sentiment of the colonies in respect to them. . .

"In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods."

In conclusion, MR. JUSTICE SUTHERLAND emphasized that the ruling here does not in any way import to publishers an immunity from ordinary forms of taxation for governmental support, but is limited to taxes the purpose or effect of which is to fetter the press.

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press."

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great inter-

preters between the government and the people. To allow it to be fettered is to fetter ourselves.

"In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our national existence has undertaken to impose a tax like that now in question.

"The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of

advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers."

The question raised as to the equal protection clause was found not to require decision.

The case was argued by Mr. Charles J. Rivet for the appellant, and by Messrs. Esmond Phelps and Elisha Hanson for the appellees.

## OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS

### Opinion 141

(May 9, 1935)

**Advertising—Publication of Articles on Legal Subjects Pictures—It is not improper for a lawyer, upon request, to write an article on a legal subject for publication in a legal fraternity magazine; nor is it improper for him, upon request, to send his picture to be published with such an article.**

**Advertising—Publication of Articles on Legal Subjects —It is not improper for a lawyer to submit for publication to the American Bar Association Journal an unsolicited article on a legal subject.**

A member of the Association, on behalf of a local Administrative Committee of a State Bar, requests the Committee's opinion upon the following facts and questions:

A lawyer received a letter from the National Secretary of the law fraternity of which he is a member, in substance, as follows:

"Inasmuch as you are quite an authority on divorce law practice can you not prepare for me, for the March issue of the 'Reporter' about a three thousand word article on this subject? We have never had anything along this line to publish and inasmuch as it seems to be one of the most necessary laws in the present age I am sure that it would be of great interest to our members. If you have a picture of yourself we would like to have that also to publish along with the article. I realize that this does not give you a great deal of time in which to prepare such an article, but inasmuch as you are so well versed on the subject I imagine that you can do this for me. I will deeply appreciate it if you will.

"With kind personal regards, I am as ever,

"Fraternally yours,

In response to this letter the attorney wrote an article entitled, "Divorce in ———," which outlined the domestic relations statutes of his state and a part of the history of some of them; it also contained some general information upon the divorce procedure and practice of the state. The author's picture appeared on the first page of the article, and his name was printed under the title; there was no other personal mention.

A lawyer wrote an unsolicited article on the "Water Appropriation Doctrine of the Western States" and sent it to the American Bar Association Journal for publication.

The ethical questions presented by these two cases are as follows:

1. Is it ethically proper for a lawyer, upon request, to write an impersonal legal article for publica-

tion in a periodical exclusively subscribed for by members of a law fraternity?

2. Would the sending upon request, of the lawyer's picture to be published with the aforementioned article be ethically proper?

3. Is it ethically proper for a lawyer, to submit an unsolicited article on a legal subject to the American Bar Association Journal for publication?

The Committee's opinion was stated by Mr. CARNEY, Messrs. Sutherland, Strother, Martin, Phillips, Harris and Arant concurring.

The first question submitted appears to be answered generally by Opinion 92. It was there held, upon the authority of Canon 40, that it was professionally proper for an attorney not only to write, but even to sell, articles upon legal subjects to periodicals of general circulation. Consequently, we see no impropriety in a lawyer, upon request, writing an article on a legal subject for publication in a legal fraternity or other magazine.

With reference to the second question, we are of the opinion that there is no professional impropriety in the lawyer's sending his picture upon request, to be published with his article. The publication of the picture in this case does not constitute solicitation; rather its purpose is to create interest in legal subjects and friendly relationships among members of the fraternity. This case is not comparable to that which was considered in Opinion 140. In that case, a lawyer posed with his client for a picture he knew was to be used in connection with a sensational newspaper story concerning a case the lawyer was handling; that was clearly solicitation and of a reprehensible nature.

For the reasons set forth in answer to question one, we are of the opinion that it is not ethically improper for a lawyer to submit an unsolicited article to the American Bar Association Journal for publication. We do not regard this as a bid for professional employment; however, even if it were so regarded, such conduct is permitted by Canon 46, which provides as follows:

"Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that it is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper."

If, under the provisions of Canon 46, it is ethically proper for a lawyer to insert an advertising card in a legal periodical, a fortiori, it is ethically proper for him to have an article dealing with his specialty pub-

lished, without compensation, in a legal periodical. Compare Opinion 121.

### Opinion 142

(May 9, 1935)

**Judge Practicing Law.**—It is improper for a lawyer to practice in a court over which he occasionally presides as judge pro tempore.

**Assistant Prosecutor Practicing Law.**—It is improper for an assistant prosecutor to defend a client in a criminal case.

**Disqualification of Law Partners.**—It is improper for the partner of a judge to practice in the court over which he presides or for the partner of an assistant prosecutor to defend a criminal case.

The Chairman of a Committee on Legal Ethics of a Young Lawyers Club requests the Committee's opinion as to the propriety of a Judge Pro-tem, or his partners, appearing on behalf of clients in the court over which the Judge occasionally presides and of an Assistant Prosecutor, or his partners, appearing in defense of criminals in the court in which it is occasionally the Assistant Prosecutor's duty to substitute for the regular prosecuting officer.

The Judge Pro-tem of both the civil and criminal divisions of a Municipal Court and his partners appear in that court in behalf of clients, and the Assistant Prosecutor and his partners appear in behalf of defendants in the criminal division of the same court. The statute creating the court provides for a Judge Pro-tem who shall preside "when the Judge of said Court is prevented from attending to his duties on account of sickness, or other disability or by absence from the city." It also provides that "he shall not be debarred from practicing in said Court except in matters which come up before him as such judge. The duties of the Assistant Prosecutor are to prosecute cases on behalf of the state, when for any reason the regular prosecuting attorney is unable to do so. The salaries of both the Judge Pro-tem and the Assistant Prosecutor are meager and alone would be insufficient to support the incumbents of these offices.

The Committee's opinion was stated by Mr. CARNEY, Messrs. Sutherland, Strother, Martin, Phillips, Harris and Arant concurring.

This problem, as far as conduct of the Judge Pro-tem is concerned is covered by the express language of Canon 31 of Judicial Ethics:

"In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

"He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy."

The statutory provision that a Judge shall not be debarred from practicing in the court over which he sometimes presides, does not justify his practicing there. A legislature cannot by enacting a statute render ethical that which is inherently unethical. Standards of professional conduct are not matters of legislative determination. They derive from the expressed view of the majority of the profession and its ultimate acceptance by the Courts.

Nor does the fact that the compensation provided

for the office is meager furnish a justification. With every benefit, there is a corresponding burden. If one is not willing to undertake the burden, he should not accept the benefit of the office.

The Committee is of the opinion that it is ethically improper for a Judge Pro-tem to appear as an attorney in a court over which he presides.

A public prosecutor has as his client the state. It is obvious therefore, that he cannot appear for any defendant in cases in which the state is an adverse party. The second paragraph of Canon 6 provides in substance that a lawyer cannot represent conflicting interests "except by express consent of all concerned given after a full disclosure of the facts." In Opinion 16, it was held that the prosecutor could not represent both the public and the defendant, and neither can a law firm serve two masters because, "The positions are inherently antagonistic, and this would be so irrespective of Canon 6. No question of consent can be involved as the public is concerned and it cannot consent." Compare Opinions 77, 134, 135, and 136.

In the case of *In Re Wakefield, Vt.*, 177 Atl. 319 (1935), a county attorney was suspended for three months for representing a client whom it was his duty to prosecute in his official capacity. The court said:

"It is a matter of common knowledge, of which we take judicial notice, that it has been the practice of some State's attorneys to appear in another county in the State and defend a respondent charged with committing a crime in such other county, or to appear in proceedings in which the State was an opposing party or had adverse interests. Such practice is unethical and improper and it should not be followed or countenanced. A state's attorney in this State is not merely a prosecuting officer in the county in which he is elected. He is also an officer of the State, in the general matter of the enforcement of the criminal law. It is the State, and not the county, that pays his salary and official expenses."

In support of this conclusion, the court referred to Canon 6 of the American Bar Association Canons of Professional Ethics and Grievances and Opinion 118 of this Committee, promulgated on December 14, 1934, wherein it was held that a county attorney, whose duty it was to prosecute crimes committed within the county, while in office, might not properly undertake to obtain a pardon or parole of one convicted of a crime in another county. It was there stated:

"For one county attorney to engage in undoing the work of another would present an appearance of confusion and pulling at cross purposes that would tend to diminish the public's confidence in and respect for law enforcement. The application for a pardon or parole appears to be a proceeding in which the State is interested adversely to the convict. The convict's representation should be left to those who are not attorneys for the State."

The Committee is of the opinion that it is improper for an Assistant Prosecutor to defend any client in a criminal case.

On several occasions this Committee has held that neither a law firm nor a partner thereof can properly accept employment which any member of the firm cannot properly accept. See Opinions 49, 50, 72, 103 and 104.

The Committee is therefore of the opinion that it is improper for a partner of a Judge Pro-tem to practice in the court over which he presides, and that it is likewise improper for the partner of an Assistant Prosecutor to defend any client in a criminal case.

**Opinion 143**

(May 9, 1935)

**Judicial Conduct.**—A judge should not permit a law firm, of which he was formerly an active member, to continue to carry his name in the firm name.

A member of the Association submits the following question:

Is it proper for a judge, elected to the bench of a superior court for a term of years, to permit a law firm, of which he was formerly a member, to continue to carry his name in the firm name, when the duties of his office require his full time and he is paid an annual salary therefor?

The Committee's opinion was stated by MR. PHILLIPS, Messrs. Carney, Sutherland, Strother, Martin, Harris and Arant concurring.

"If a member of the firm becomes a judge, his name should not be continued in the firm name, as it naturally creates the impression that an improper relation or influence is continued or possessed by the firm." Canon 33.

"He should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor." Judicial Canon 13.

"He should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade . . . others to patronize or contribute . . . to the success of private business ventures . . . He should, therefore, not enter such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others." Judicial Canon 25.

Retention of the judge's name in the firm name might create the impression that the firm possesses an improper influence with the judge, and, in consequence, tend to impel those in need of legal services in connection with matters before the judge to employ the firm. We are of the opinion that such use of the judge's name improperly promotes the business interest of the firm and that it is directly inhibited by the Canons quoted.

The conduct of a judge should be above reproach.

**Opinion 144**

(May 9, 1935)

**Professional Employment.**—It is not professionally improper for a lawyer to accept employment to collect a claim from, or to bring suit against, another lawyer.

A member of the Association requests the Committee's opinion as to whether it is proper for a lawyer to accept employment to collect a claim from, or to institute a suit against, another lawyer.

The Committee's opinion was stated by MR. HARRIS, Messrs. Carney, Sutherland, Strother, Martin, Phillips and Arant concurring.

"Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. . . . He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice." Canon 29.

We are of the opinion that it is not professionally improper for a lawyer to accept employment to compel another lawyer to honor the just claim of a layman. On the contrary, it is highly proper, that he do so. Unfortunately, there appears to be a widespread feeling among laymen that it is difficult, if not impossible, to obtain justice when they have claims against mem-

bers of the bar because other lawyers will not accept employment to proceed against them. The honor of the profession, whose members proudly style themselves officers of the court, must surely be sullied if its members bind themselves by custom to refrain from enforcing just claims of laymen against lawyers.

**Opinion 145**

(July 17, 1935)

**Advertising.**—The canons of the Association and the opinions of this committee condemn solicitation of professional employment, both from the lay public and other lawyers.

**Notice of Specialized Legal Service.**—The provision of Canon 46 in regard to specialized legal services is an exception to the general rule concerning advertising and is to be strictly construed.

A member of the Association requests our opinion on the following question:

Would it be proper for a lawyer, who restricts his practice largely to advice and assistance to other lawyers, to mail to lawyers in the city where he practices, the following card:

(Name)  
(College degrees)  
(Attorney at law)  
(Street Address)  
(City and State)  
(Telephone Number)  
"Specialization in Legal Research—Preparation  
Cases for Trial and Appeal—Trial and Appel-  
late Briefing—Rendition of Written  
Opinions."

The opinion of the committee was stated by MR. PHILLIPS, Messrs. Carney, Sutherland, Strother, Martin, Harris, and Arant concurring.

"Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that it is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper." Canon 46.

Do the services listed in the proposed advertisement constitute such a specialized legal service as is contemplated by Canon 46?

All of the services listed in the above advertisement are rendered by every general practitioner. In fact practically the whole field of the practice of law, except for court appearances, is covered. Legal research and the preparation of briefs for the trial and appellate courts are not specialized services; in the larger law firms, such work is done by juniors or even law clerks.

We are of the opinion that the services enumerated cover too broad a range to come within the purview of the phrase "specialized legal service" as contemplated by Canon 46, and that the card in question constitutes improper advertising.

The canons of the Association and the opinions of this committee (See Opinions 1, 24, 36 and 123) condemn solicitation of professional employment both from the lay public and other lawyers. Canon 46 recognizes an exception in respect to notices of a specialized legal service that will afford convenient and beneficial information to lawyers who may desire to obtain such a service. Being an exception, it should be strictly construed; otherwise, the door will be thrown open to objectionable advertising.

## CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

### Among Recent Books

**JOHN JAY.** By Frank Monaghan. Bobbs-Merrill Co. New York and Indianapolis.—While not definitive, this is the best biography of John Jay that has yet appeared. Earlier biographies, written by relatives, pictured "a petrified Roman in a toga," whereas Mr. Monaghan discloses "a great American, who was frequently witty and sometimes ribald."

Superficially there is a curious parallel between the career of this the first chief justice and that of the present incumbent. Each was governor of New York; each was in charge of foreign affairs; each headed the Federal judiciary. The emphatic contrast is that the governorship was but a stepping stone in the brilliant career of the present chief justice, while Jay resigned as chief justice to become governor.

On the surface Jay's relinquishment of the chief justiceship to become governor furnishes a startling commentary upon the change that has occurred in the prestige incident to the highest offices in state and federal government. Actually this is largely, but not entirely true. In resigning Jay was motivated to some extent by his reluctance at seeming to desert his friends who had elected him governor in his absence, by his desire to be with his family and by his distaste for his peripatetic Circuit Court duty.

At the time of his death the high points in Jay's career seemed his conduct of foreign affairs, his negotiation of the detested Jay's Treaty and his governorship. During the four years of his service as chief justice he was for a part of the time absent upon diplomatic business, the court had few cases before it and the significance and far-reaching implications of its decisions were by no means foreseen. Today, however, his other activities have merely an historical interest except as they furnish a key to his judicial mind, while his conduct of the chief justiceship is a matter of present vital concern.

Washington's choice of the first chief justice was one of his happy selections. He was an eminent lawyer and as fixed as Marshall in his belief in a strong central government. While he had not been a member of the Constitutional Convention he was one of the authors of "The Federalist." Moreover, there was none more fearless or independent.

Washington himself was one of the first to be rebuffed by that fearlessness and independence. The President in a prize case sought to secure legal advice from the justices of the Supreme Court, but "they, after long deliberation, declined to give an opinion in a case not regularly litigated before the court."

In one instance Jay showed himself an even stronger Federalist than Marshall. Marshall had agreed with Hamilton and Madison that a state would not be subject to suit by a citizen of another state. In a debate

in the Virginia Convention he had said that he hoped "that no gentleman will think that a state will be called before the bar of a Federal Court." Jay, however, applied literally the language of Article III in *Chisholm vs. Georgia*, and sustained such a suit. The result was a storm of protest and eventually the Eleventh Amendment.

In 1791 Jay presided over a Circuit Court which invalidated a Connecticut statute because it infringed upon the provision of a treaty of the United States. The following year he participated in a decision declaring unconstitutional a law of Rhode Island as impairing the obligation of a contract in violation of the Federal Constitution. Of this Mr. Monaghan remarks:

"Following this first decision other courts proceeded to declare invalid the statutes of other states. There is no evidence that this action was claimed by contemporaries to be without constitutional authority. It required thirty years for the proponents of state's rights to discover that this power was, as they came to maintain, unconstitutional."

Federalist as he was, Jay was quite as ready to uphold the Constitution against the national as against the state governments. When Congress enacted a law requiring the Circuit Courts to pass upon the claims of pensioners, subject to revision by the Secretary of War and Congress, Jay declined to enforce it as unconstitutional because imposing non-judicial duties upon judges.

Jay's achievements as chief justice may be epitomized: he asserted the independence of the judiciary; he upheld the supremacy of the Constitution over both state legislatures and Congress.

In 1800 John Adams offered to reappoint Jay Chief Justice. In urging his acceptance the president wrote that "in the future administration of our country, the firmest security we can have against the effects of visionary schemes and fluctuating theories, will be a solid judiciary." Influenced primarily by the condition of his health, Jay declined, and John Marshall was appointed in his stead.

Inevitably it is measurably true that the law and the Constitution are what the judges say they are. For this reason painstaking biographies of judges—such as this—have an enduring value. They supply for decisions reasons that do not always appear in the opinions.

WALTER P. ARMSTRONG.

Memphis, Tennessee.

*Roger B. Taney*, by Carl Brent Swisher. 1935. New York: The Macmillan Company, Pp. 608. At the age of fifty Roger Brooke Taney was a scholarly Federalist lawyer who had slowly and conservatively acquired the position of leader of the Maryland bar. In

the political realignment at the end of Monroe's administration he most strangely became a Jackson Democrat and, during his leader's first administration, served first as Attorney-General and later as Secretary of the Treasury. In these positions he was the driving force which brought about the destruction of the second, or Biddle, Bank of the United States against the active or silent opposition of nearly all the other members of the cabinet and the vociferous opposition of both Clay and Webster in the Senate. As a consequence the latter body rejected his nomination as Secretary of the Treasury (he had been serving under an interim appointment) and subsequently side-tracked his nomination as an Associate Justice of the Supreme Court. But when John Marshall died shortly after, Jackson had so thoroughly demonstrated his control over the electorate that no one could stop the nomination and confirmation of the Bank's principal enemy as Chief Justice.

Taney gradually proved himself, in the opinion of both enemies and friends, to be a learned, honest and conscientious judge although it was not until Benjamin R. Curtis joined the Court some years later that a satisfactory theoretical basis was supplied for many of Taney's constitutional decisions. He never obtained the dominance over his colleagues that Marshall had had but, in his old age, when he seemed ready for the grave, he succeeded in drawing down on his head, through the Dred Scott decision, a storm of vituperation such as has been poured out on no other judge except possibly Lord Jeffreys.

The biography under review is distinctly laudatory. The author has obviously delved deeply into the sources and has assembled a mass of material about Taney which has not heretofore been available. But the resulting compilation is marred by a doctrinaire anxiety to explain it all in terms of the class struggle with Taney always on the side of the "right" class. In his description of the bank fight this leads the author to overlook the possibility that, in destroying the Bank, Taney was acting more for the benefit of state bankers, such as his friend Ellicott, than for the population at large. Certainly it is an open question whether the average man was not better off when business was transacted in the stable currency of the "moneyed aristocracy" than he was when it was replaced by the numerous, fluctuating and unsound currencies of the "people's" banks.

In discussing Taney's judicial career the author has grossly overdone the breakfast theory of jurisprudence. It is an attractive hypothesis that constitutional decisions are governed solely by the prejudices of the judges who render them but it is well to remember that the ingenious device to deprive negroes of votes known as the "grandfather clause" was held unconstitutional by a Southern Chief Justice who had served in the Confederate army and that the legal tender act was held bad by a Chief Justice who had been Secretary of the Treasury when the issue of irredeemable greenbacks was determined upon.

Mr. Swisher's literary gait is rather pedestrian and his difficulties with grammar, particularly the use of the infinitive, numerous; but both here and in his earlier life of Stephen J. Field he has made a definite contribution to the illumination of our constitutional history.

KENNETH B. UMBREIT.

New York City.

*Law and the Social Sciences*, by Huntington Cairns. 1935. New York: Harcourt, Brace and Company. \$4.00—This book appears to have been written by a young man whose reading has been both wide and varied. It would be amazing if his conclusions were in all cases correct. It is published in the series of the International Library of Psychology, Philosophy and Scientific Method, and reminds one not at all of Corpus Juris. The work might have been called, "Legislation and the Social Sciences." One with a great stretch of imagination might envision State legislatures and Congress composed only of great scholars. Then instead of talking about things that people generally think they understand, the factions might be lined up under the banners of Jhering opposed to Westernmark and what Bucher said of the customs of the Indians of British Guiana debated with the Muller-Lyer die-hards. The author is of the opinion that "Our legal scholars today are as apt to point the discussions with citations from the facts of biologic chemistry as from Supreme Court cases." If that is so, the ordinary practitioner has not been aware of it. The enthusiasts in the field of New Education are apt to be understood as saying that all children born more than a dozen years ago have no chance for posture or breathing, or education or sleep, and that anything based on ancient ignorant superstition is unworthy. And so, the young man who has read so much and written so brilliantly is trying to put Roscoe Pound, Harold J. Laski, G. D. H. Cole, Lester Ward, Gumplowicz and Ratzenhofer in the niches of fame which Justinian and Sir William Blackstone occupied in the "horse-and-buggy" days. Perhaps the law itself is ready for reorganization under 77-B of the Bankruptcy Act. If so, the jurists before whom the cause comes should require on the part of counsel a full familiarity with the work of this author as well as the texts of the great minds from which he quotes. Then whatever fees were allowed to the counsel they would be moderate. At that, the young man may be right.

MITCHELL D. FOLLANSBEE.

Chicago.

*American Family Laws*, by Chester G. Vernier. Vol III. 1935. Stanford University Press. 684 pp.—Professor Vernier's monumental work, the first two volumes of which were reviewed in this journal three years ago, has gone steadily forward to the completion of Volume III, which has just been published. This new volume covers the law of husband and wife. It will be remembered from the previous review that this is a comparative study of the family law of the forty-eight American states, Alaska, the District of Columbia and Hawaii to January 1, 1935. Previous volumes covered marriage, divorce and separation. The procedure in this latest volume follows the form adopted for earlier parts of the study. It includes making a brief summary of the common law, stating the statutory law, adding such comments and criticisms as are warranted, collecting references such as texts, case books, annotations, reports, articles and case notes from law magazines. Liberal use of comparative tables has been made. This volume, therefore, like the others, combines the elements of commentary, digest, annotation and reference. The topics covered include general principles, wife's ante-nuptial and post-nuptial deeds and contracts, family expenses, duty of support, domicile, property, earnings, power to make a will, dower, curtesy, assignment of wages, homestead, exempt property and family allowance.

The net impression left by this volume is the substantial improvement in the position of married women which they have won by their struggle for equality. Nevertheless, the authors indicate clearly that even the most progressive states may still improve their family legislation, that many changes are still needed in the more conservative commonwealths, that in practically all the need for equalization of burdens deserves further consideration. In justifying these general conclusions the authors submit facts to show that the common-law liability of the husband for the ante-nuptial debts of the wife has almost universally disappeared; that the common-law inability of the wife to make contracts has been removed, at least generally, in all jurisdictions; that no statutes have been found substantially lightening the husband's common law liability for the support of his wife; that statutes imposing such a duty upon the wife now exist in twenty-three jurisdictions; that modern statutes, except in a very limited degree, have not made the wife liable for her husband's debts; that criminal or quasi-criminal statutes relating to desertion and non-support have strengthened the husband's duty of supporting his wife; that the Uniform Desertion and Non-Support Act has been adopted wholly or in substance by about one-third of the fifty-one American jurisdictions; that the common law inability of husband and wife to contract with each other has been removed in sixteen jurisdictions; that in the majority of states the common law liability of the husband for the wife's pre-marital torts and contracts has been abrogated; that fifteen states have established family or domestic relations courts with jurisdiction over controversies between husband and wife; that undoubtedly American law is headed in the direction of granting a wife the same freedom as her husband in the choice of domicile; that in all states except two the wife is probably now entitled in her own right to her earnings for services rendered to third persons outside the household; that all jurisdictions have completely emancipated the married woman from her common law incapacity to make a valid will.

The authors recommend positively certain changes in present law, such as the complete abolition of dower and curtesy, the removal of all disability of a married woman to contract, that states which have not already done so should pass statutes compelling the wife to support the husband when he is unable to support himself, and should adopt the Uniform Desertion and Non-Support Act and should establish family and domestic relations courts, that one-half of the states should clarify the right of one spouse to convey land and transfer personal property to the other by the passage of such a statute as already exists in at least eight states, that in many states the law relating to the property rights of married women could well be recodified and simplified, that all states need legislation to confer upon the wife the same power to choose her domicile that the husband has.

In short, Volume III of this great study maintains the high level attained in the preceding volumes.

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*Social Work and the Courts*, by Sophonisba P. Breckenridge. The University of Chicago Press, 1934. 610 pages. One of the latest volumes in the social service series issued by the University of Chicago Press is Professor Breckenridge's "Social Work and the Courts." This volume is primarily a text book for students in social service administration. Consequently, it combines certain features of a source book with a

running commentary on the statutes and cases cited, together with a preliminary analysis of the law as it bears upon the specific problems handled by social workers, an evaluation of the methods by which these laws and decisions are applied to specific problems, and suggestions for further legislation, revision of present legislation and recommendations for new types of procedure and treatment. The topics covered are varied, and include such items as the federal and state courts, conflict of laws, the costs of judicial administration, causes of dissatisfaction with the law, reorganization of the judicial structure, substitution of the administrative for the judicial tribunal, criminal administration, probation, the woman offender, administration of mothers' pensions, the juvenile court. Interesting comparisons are worked out between American and English practice. An excellent selected bibliography adds to the useability of the volume.

ARTHUR J. TODD.

Northwestern University

## Leading Articles in Current Legal Periodicals

*Harvard Law Review*, January (Cambridge, Mass.)—Visitatorial Jurisdiction over Corporations in Equity, by Roscoe Pound; Federal Incorporation and Securities Regulation, by Harris Berlack; Courts and Administrative Law—The Experience of English Housing Legislation (with a Foreword by Felix Frankfurter), by W. Ivor Jennings.

*University of Pittsburgh Law Review*, October (Pittsburgh, Pa.)—Defamation in Pennsylvania, by Harold R. Schmidt and William K. Unverzagt.

*California Law Review*, January (Berkeley, Cal.)—Penal Ordinances in California, by J. A. C. Grant; The California Use Tax, by Roger J. Traynor; State Sales Taxes and the Commerce Clause, by George M. Johnson.

*University of Pennsylvania Law Review*, January (Philadelphia, Pa.)—The Limits as to Effective Federal Control of the Employer-Employee Relationship, by Alpheus T. Mason; Beale on the Conflict of Laws, by H. L. McClintock; The Duties of a Trustee with Respect to Defaulted Mortgage Investments, by Parker Bailey and Charles Keating Rice; Constitutional Issues in the Supreme Court, 1934 Term, by Osmond K. Fraenkel.

*Columbia Law Review*, January (New York City)—The Sugar Institut: Case and the Present Status of the Anti-Trust Laws, by Milton Handler; The 1935 Amendment of the Railroad Reorganization Act, by Henry J. Friendly; Fog and Fiction in Trade-Mark Protection, by Frank I. Schechter.

*Illinois Law Review*, January (Chicago)—The National Housing Program, by John W. Brabner-Smith and V. Joyce Brabner-Smith; Virtual Representation in Actions Affecting Future Interests, by F. Carlisle Roberts; The Management of Civil Trial Calendars in Cook County, by Hortense Klein.

*Fordham Law Review*, November (New York City)—St. Thomas More, Lawyer, by Brendan F. Brown; Legal and Investment Standards of Trustees, by George P. Woodruff; The Opinions of United States Supreme Court for the 1934 Term—General Issues, by Osmond K. Fraenkel.

*Yale Law Journal*, December (New Haven, Conn.)—Amending the Securities Act—The American Bar Association Committee's Proposals, by E. Merrick Dodd, Jr.; Admissions Implied from Spoliation or Related Conduct, by John Arthur Maguire and Robert C. Vincent; Drawing Against Uncollected Checks: II, by Underhill Moore, Gilbert Sussman, Emma Corstvet.

*Law Notes*, January (Brooklyn, N. Y.)—The Limitations of League Sanctions Under International Law, by

Harold Roland Shapiro; Testamentary Capacity, by Berto Rogers; Improbable Tales of Bankrupts.

*Wisconsin Law Review*, December (Madison, Wis.)—The Work of the Wisconsin Supreme Court for the August, 1934, and January, 1935, Terms.

*Michigan Law Review*, December (Ann Arbor, Mich.)—The Banking Act of 1935, by Harold James Kress; May the Bar Set its Own House in Order? by Lowell Turrentine; A Proposed Plan of Classification for the Law, by Charles C. Ulrich.

*Notre Dame Lawyer*, November (Notre Dame, Ind.)—Thomas More—A Lawyer Martyr, by Leo J. Hassenauer; Principles of the Law of Succession to Intestate Property, by W. D. Rollison; The American Law Institute's Restatement of the Law of Agency with Annotations to the Indiana Decisions.

*Boston University Law Review*, November (Boston, Mass.)—Deportation of Aliens, by Ruben H. Klainer; Constitutionality of Discrimination Based on Sex, by Blanche Crozier; Report of American Bar Association Committee on Admiralty and Maritime Law.

*Oregon Law Review*, December (Eugene, Ore.)—The Bar and the Present Crisis, by James T. Brand; The Legal Aspects of the Labor Movement, by B. A. Green; The Functioning of a Statutory Bar, by Charles A. Beardsley; Price Fixing and Marketing Regulations, by Robert M. Kerr; Address, Robert F. Maguire; Address, Charles H. Martin.

*Commercial Law Journal*, November (Chicago)—Has the Constitution Become Antiquated, by Royal A. Stone; Recent Developments and Their Relation to the League's Polity and Future, by L. E. Osborne; The Social Security Act and Its Tax Problems, by G. Aaron Youngquist; What Is a Reputable Law List, by Herbert U. Feibelman; Why Buyers Must Still Beware, by B. H. Hartogensis; Interpretations Under Section 77-B, by Archie Schimberg.

*Commercial Law Journal*, January (Chicago)—Problems of Unemployment Compensation, by Charles N. Orr; The Bench, The Bar and the Public, by Lewis Howell Smith; Is Bankruptcy Jurisdiction Exclusive? by Reuben G. Hunt; The Challenge of the Times, by Samuel Thomas Bledsoe; Other People's Business, by Edward F. Flynn; Federal Licensing Power, by O. R. McGuire.

*Southern California Law Review*, November (Los Angeles, Cal.)—Property Affected with a Public Interest, by Emmet H. Wilson; The Lawless Enforcement of the Law, by Leon R. Yankwich; Legislation—The California "Dead Man's Statute," by William G. Hale.

*Washington Law Review*, November (Seattle, Wash.)—Moral Obligation as Consideration for a Promise in Washington, by Robert L. Palmer; The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases, by W. G. McLaren.

*Texas Law Review*, December (Austin, Tex.)—Functional Indications in Reported Opinions, by Robert W. Stayton; Limitations Under the Workmen's Compensation Act of Texas, by J. John Lawler and Gail Gates Lawler; Criminal Law Administration in Canada, by Damon C. Woods; The Barrister and the Solicitor in British Practice, by W. Erskine Williams; French Translation of Restatement of Conflict of Laws.

*Canadian Bar Review*, November (Ottawa, Ont.)—British Coal Corporation and Others v. The King: Three Comments, by Potter Oyler; W. P. M. Kennedy, V. C. MacDonald; The Legal Nature of Bank Deposits in Quebec, by George V. V. Nichols; The Organization and Administration of Justice in France, with an Outline of French Procedure with Respect to the Production of Evidence, by O. S. Tyndale.

*Canadian Bar Review*, December (Ottawa, Ont.)—Constitutional Aspects of the New Deal in the United States, by Charles K. Burdick; The Legal Nature of Bank Deposits in Quebec, by George V. V. Nicholls, Presumptions as Affecting the Proof of Criminal Charges, by Prof.

George H. Crouse; "Greek Catholic" and "Greek Orthodox" by W. L. Scott.

*Marquette Law Review*, December (Milwaukee, Wis.)—The Wisconsin Homestead Exemption Law, by William L. Crow; Industrial and Labor Adjustments by Interstate Compacts, by Francis C. Wilson; The Laws of 1935 of Special Interest to the Bar, by Cornelius Young.

*Cornell Law Quarterly*, December (Ithaca, N. Y.)—Cuthbert W. Pound: an Appreciation, by Frank H. Hiscock; A Liberal Judge: Cuthbert W. Pound, by Henry W. Edgerton; An Introduction to American Admiralty, by G. H. Robinson.

*Tennessee Law Review*, December (Knoxville, Tenn.)—Judicial Control Under the Federal Constitution, by James B. Newman; Development of a National Police Power, by James A. Lyons; Mysterious Disappearances, by Aubrey F. Folts; How the Integrated Bar Serves the Lawyer, by Charles A. Beardsley; "The Forgotten Lawyer," by R. Allan Stephens.

*United States Law Review*, December (New York City)—National Organization of the Bar, by Philip J. Wickser; Corporate Reorganizations under Section 77B, by John Gerdes.

*Virginia Law Review*, February (University, Va.)—"Lapse Statutes" and Their Effect on Gifts to Class, by Thomas M. Cooley; The Permanent Court of International Justice as a Court of Appeals, by Sidney P. Jacoby; Mr. Thellusson's Will, by Herbert Barry.

*Tulane Law Review*, February (New Orleans, La.)—Idealism Emergent in Jurisprudence, by Rufus C. Harris; Simulation in the Civil Law, by F. Bayard Rives; Factors in the Reception of Law, by Albert Kocourek; The French Law of Naturalization, by Marc Ancel; Some Aspects of Treaty Interpretation in the United States—1930-1935, by Theodore W. Graske.

*Harvard Law Review*, February (Cambridge, Mass.)—The Trustee's Duty of Loyalty, by Austin Wakeman Scott; Legal and Social Aspects of Arrest Without a Warrant, by Jerome Hall; Social Justice and Business Costs—A Study in the Legal History of Today, by Joseph H. Beale; Processing Taxes and Protective Tariffs, by Henry M. Hart, Jr.

*Notre Dame Lawyer*, January (Notre Dame, Ind.)—Delegation of Legislative Authority, by William Sternberg; Principles of the Law of Succession to Intestate Property, by W. D. Rollison; The American Law Institute's Restatement of the Law of Agency with Annotations to the Indiana Decisions.

*Rocky Mountain Law Review*, February (Boulder, Colo.)—Trends in Constitutional Law, by Joseph P. Pollard; The Growth and Development of American Law Schools, by James D. McGuire; The Remedy of Specific Performance in Colorado Contracts: Part II, by Terrell C. Drinkwater.

*Georgetown Law Journal*, January (Washington, D. C.)—Legal Doubt or Determination as a Ground for Refusing Mandamus, by Theodore W. Cousins; Growth of Federal Licensing, by Charles V. Koons; Making Ethical Lawyers—Some Practical Proposals for Achieving the Goal, by John S. Bradway; The Discretion of Directors in the Distribution of Non-Cumulative Preferred Dividends, by W. H. S. Stevens.

*Illinois Law Review*, February (Chicago, Ill.)—Codification of Illinois Insurance Laws, by George W. Goble; The Self-Determination of Equity, by Jeff B. Fordham; The Liability of State Bank Shareholders in Illinois, by F. H. Gane.

*Tennessee Law Review*, February (Knoxville, Tenn.)—States' Rights not a Dead Issue, by Chas. N. Burch; The Strange Deception of Mary Doherty, by Giles L. Evans; Liability of Surety Whose Bond is Executed Under Mutual Mistake of Fact, by Elmer W. Beasley; Corporate Bonuses and Stockholders' Rights, by W. B. Cohen.

*Commercial Law Journal*, February (Chicago)—Senatorial Investigation of Bankruptcy and Equity Receiverships, by Reuben G. Hunt; The Future of the American Lawyer, by Alva M. Lumpkin; The Bank-Bar Agreement, by Hubert T. Morrow; Andrew Jackson, by Benjamin Axleroad; The March of the Constitution, by Edwin A. Krauthoff; Abraham Lincoln, by Charles Dautch; How the Integrated Bar Serves the Lawyer, by Charles A. Beardsley.

*North Carolina Law Review*, December (Chapel Hill, N. C.)—Some Aspects of Constitutionalism and Federalism, by Thomas Reed Powell; The Constitutionality of the A. A. Processing Tax, by Thos. F. Green, Jr.; The Influence of State Competition in the Adoption of Regressive Taxes: The North Carolina Sales Tax, by E. M. Perkins.

*Cornell Law Quarterly*, February (Ithaca, N. Y.)—The President's Power to Remove Members of Administrative Agencies, by William J. Donovan, Ralstone R. Irvine; The Federal Motor Carrier Act of 1935, by John J. George; Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power, by Elmer E. Smead.

*University of Pennsylvania Law Review*, February (Philadelphia, Pa.)—Institute Bards and Yale Reviewers, by Herbert F. Goodrich; Landlord's Tort Liability for Disrepair, by Laurence H. Eldredge; Criminology and the Law of Guilt, by John S. Strahorn, Jr.

*Michigan Law Review*, January (Ann Arbor, Mich.)—The Secured Creditor's Share of an Insolvent Estate, by Fred T. Hanson; Fees and Expenses in a Corporate Reorganization Under Section 77B, by George F. Medill.

## INFLUENCE OF THOMAS ALLEN . . .

(Continued from page 174)

the bargain with J. and Williamson, had not been legally affected by the *Repealing Act of Georgia*—That Act they considered a mere nullity—as a . . . violation of the first and fundamental principles of social compacts. The idea of a Legislature reclaiming property they had once sold, and been paid for, was said by the Court to be not less preposterous than for an individual to repeal his own note of hand, or to render void by his own act and determination, any contract, however sacred or solemn. . . . Whether the original grant of the Georgia Legislature was valid or not, was considered by the Court a cause of judicial, and not of legislative cognizance. The Repealing Act of Georgia was moreover declared void, because it was considered directly repugnant to Article 1st, Sec. 10, of the United States Constitution, which provides that 'no State shall pass any *ex post facto* law, or law impairing the obligation of contracts.'

This decision is particularly interesting because it was rendered ten years before the decision of *Fletcher v. Peck*, 6 Cranch, 87, in which the Supreme Court of the United States announced the same conclusion in regard to the same statute of Georgia.

In June, 1919, President Calvin Coolidge, then Governor of Massachusetts, in an address at Harvard Commencement, said:

"The men of that day almost alone in history brought a revolution to its objective, not only that, they reached it in such a condition that it there remained . . . Their success lay entirely in the convictions they had."

In a romance called, "The Old Country," published in 1906 by Henry Newbolt,—the twentieth century hero listens to the following conversation:

"But surely in the Middle Ages they were mediaeval?"

"They were not mediaeval, they were alive."

"But quaint?"

"No alive; and a man's life does not reside in his clothes . . . when they have long been discarded they may come to be called quaint—by the inhabitants of the future."

The hero says, "I have not yet got used to your way of speaking of these ancient inhabitants. To me their names suggest stiff stone figures on dilapidated tombs; to you they seem to be in no way different from the people in this year's red book."

The hero then has a dream, in which he sees and talks with people of the 14th century and listens to a vivid description of the battle of Poitiers and of the character of the Black Prince by a young officer who took part in it—such as a young officer in the World War might give today of a battle on the western front and the character of his general.

So, also, we find the following words in Professor Channing's "Preface" to the first volume of his "History of the United States":

"Writers on American history have usually regarded the colonists as living a life somewhat apart from the rest of mankind . . . The outlook of the present work is different . . . I have thought that the most important single fact in our development has been the victory of the forces of union over those of particularism. It is essential that the forces and institutions which have made for disunion should be treated at length and in a sympathetic spirit; but it is even more necessary that the forces and institutions which have made for union should be constantly borne in mind and brought to the attention of the reader, for it is the triumph of these which has determined the fate of the nation . . .

"I have tried to see in the annals of the past the story of living forces, always struggling onward and upward toward that which is better and higher in human conception. It is only in this way that justice can be done to the memories of those who have gone before and have left for us a splendid heritage."

In speaking of Magna Charta, Pollock and Maitland, in their "History of English Law" say "in brief it means this, that the king is and shall be below the law." Thinking close to human nature and its tendencies, Otis carried this principle of Magna Charta further for the protection of the people. He said, in substance, legislators are men, and legislatures, like kings, must be below the law. But how shall they be below the law? He answered, there are certain fundamental principles which must be recognized even by Parliament, and these principles are applied by independent and impartial courts of justice.

It fell to Otis and John Adams to formulate the opposition to parliamentary aggression on grounds of principle reflecting the practical sentiment of the colonies by some constructive policy of restraint which should govern the exercise of great power. They did this on constitutional grounds as loyal subjects of the Crown before the colonies or they themselves contemplated revolution. When, in addition to parliamentary aggression, the abuses of the prerogative of the King became more threatening, John Adams, instead of "retreating from one strategic position to another," advanced on constitutional grounds to the position of defiance of the Prerogative.

Some wit has described law as "that which is plausibly put forward and vigorously maintained."

Such was the law asserted and finally established during the Revolutionary period as a result of this constitutional thinking. It was not bad law merely because the orthodox Englishmen, on and off the bench of that day, did not understand it. Governor Pownall saw the danger of the Prerogative, but he did not understand the English Constitution as Adams did. As Otis said, following Locke, "Although most governments are *de facto* arbitrary . . . none are *de jure* arbitrary." This was a lawyer's way of saying what the Puritans said in 1646—that what was opposed to the Law of God, even if in the form of law, was not law, but error.<sup>12</sup>

Some years ago, a friend of mine from the Connecticut valley remarked "Two-thirds of the common sense in Massachusetts is west of Worcester." As a Bostonian, of course, I can not agree altogether with the correctness of his fraction, but there can be no question that the men of western Massachusetts have contributed a great deal of the balancing sense to the government of the Commonwealth ever since the middle of the eighteenth century when Joseph Hawley, of Northampton, was the man of judgment in the House of Representatives. It is well to remember in these days that the constitutional movement in Massachusetts did not come from the wealthy or aristocratic portion of the community; neither did it come from professional politicians; but it was forced upon them all by a group of "dirt" farmers of the Berkshire Hills led by a country parson with a power of statement. They had thought enough about human nature to realize that, while they had removed King George III from the American throne, they had put King Voting-Majority in his place, and that, as a practical matter, the exercise of power by King Voting-Majority, or his representatives, might be as unpleasant as that of King George III. They did not deceive themselves with mere glittering generalities of theoretical "democracy." They knew they were facing a condition and not a theory. They intended to have this new king "below the law" and to have the law stated in a bill of rights and a constitutional frame of government, and they refused to let the court sit in Berkshire County until they got such a law which they, as citizens, had a right to require their magistrates to apply. Their work did not stop with the adoption of the state constitution. Those visitors to Massachusetts who come by motor cars may wish to drive to Constitution Hill in Lanesborough, on which stands a monument to Capt. Jonathan Smith, another "dirt" farmer, who took part in the debate in favor of the ratification of the Federal Constitution in the Massachusetts Convention in 1788 as follows:

"Mr. President, I am a plain man and get my living by the plough. I am not used to speak in public, but I beg your leave to say a few words to my brother plough-joggers in this house. I have lived in a part of the country where I have known the worth of good government by the want of it. There was a black cloud that rose in the east last winter, and spread over the west. (Here Mr. Wedgery interrupted: Mr. President, I wish to know what the gentleman means by the east?) I mean, Sir, the county of Bristol. The cloud rose there, and burst upon us, and produced a dreadful effect. It brought on a state of anarchy, and that leads to tyranny . . . It is better to have one tyrant than so many at once.

"Now, Mr. President, when I saw this Constitution, I found that it was a cure for these disorders. It was just such a thing as we wanted. I got a copy of it and read it over and over. I had been a member of the Convention to form our own State Constitution, and had learnt something of the checks and balances of power, and I found

them all here. I did not go to any lawyer and ask his opinion; we have no lawyer in our town, and we do well enough without. I formed my own opinion, and was pleased with this Constitution. My honorable old daddy there (pointing to Mr. Singletary) won't think that I expect to be a Congressman, and swallow up the liberties of the people. I never had any post, nor do I want one, and before I am done you will think that I don't deserve one. But I don't think the worse of the Constitution because lawyers, and men of learning, and moneyed men, are fond of it. I don't suspect that they want to get into Congress and abuse their power. I am not of such a jealous make. They that are honest men themselves are not apt to suspect other people. I don't know why our constituents have not as good a right to be jealous of us as we seem to be of Congress, and I think these gentlemen who are so very suspicious that as soon as a man gets into power he turns rogue, had better look at home. . .

"Some gentlemen think that our liberty and property are not safe in the hands of moneyed men, and men of learning. I am not of that mind . . . these lawyers, these moneyed men, these men of learning, are all embarked in the same cause with us, and we must all swim or sink together; and shall we throw the Constitution overboard because it does not please us alike?"<sup>13</sup>

That convention lasted from January 9, 1788, until February 7th. A majority of the convention were opposed to ratification until January 29, when John Hancock, the president, proposed the substance of a number of amendments in the nature of a bill of rights to be recommended to the first congress at the same time that the convention ratified the constitution. This plan turned the tide and resulted in ratification and recommendations of the substance of such amendments which were subsequently submitted and adopted as the Federal bill of rights in the first ten amendments.

It is generally agreed that the support of Samuel Adams was essential to ratification. On February 1, he gave that support to the recommendations of Hancock, and, in the course of his speech, said:

"Your Excellency's first proposition is, 'that it be explicitly declared, that all powers not expressly delegated to Congress, are reserved to the several States, to be by them exercised.' This appears to my mind to be a summary of a bill of rights, which gentlemen are anxious to obtain; it removes a doubt which many have entertained respecting this matter, and gives assurance that if any law made by the Federal government shall be extended beyond the power granted by the proposed Constitution, and inconsistent with the Constitution of this State, it will be an error, and adjudged by the courts of law to be void." (See Debates of Convention of 1788, p. 233.)

The Federal Constitution was ratified, and the battle shifted to the conventions in Virginia and New York, to the shoulders of Madison and Marshall, Hamilton and Jay, with the great character and influence of Washington in the background.

I trust that the story which I have told, so intimately connected as it is with the birth of the nation, may help to stir the imagination of my fellow-members of the American Bar Association on their visit to Massachusetts, and call up a vision of life as it was, not only in the Old State House, the old South Church and Faneuil Hall, but also in the town meetings of Berkshire County and other parts of the state; for the real significance of the historic buildings and of those town meetings lies, not merely in the disruptive revolutionary history which took place in them, but in the constructive fact that it all led to the Constitution of Massachusetts and contributed to the Constitution of the United States.

12. See Hosmer "Winthrop's Journal" II, 301.

13. Journal Massachusetts Convention 1788, pp. 203-205.

# Letters of Interest

## Misconceptions as to Province of U. S. Supreme Court

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The type of criticism of the Supreme Court by those disappointed at the decision as to the AAA (297 U. S. . . ., 56 S. C. R. 312) has created misconceptions as to the province of this Court. Some critics urge that the power of decision be transferred from the majority to the minority of the Court, or from the Court to the two men who complete the majority of the Congress.

As the subject cannot be covered briefly, may I ask anyone interested, to consider an article in the Congressional Record for January 23, in which some of the reasons are more comprehensively stated, why such a transfer would be unwise and why the AAA decision is right. To summarize them:

The Congress has no power to make a law which it has no power to make. Neither a unanimous vote nor good intentions nor beneficent results can create that power. The Constitution defines the power.

The thirteen sovereign States and their respective peoples created this Nation by a constitution which contractually determined what sovereign powers the States transferred to The Congress. No State gave to The Congress that category of government which covers the policy of expanding or of restricting the farming of the acres within the State. That power cannot be both in The Congress and in the State.

It is a judicial proceeding, and not law making or legislating, to determine without war, the location of a disputed boundary, be it between the lands of two sovereigns or between the categories of government of two sovereigns, one the State and the other the Nation.

If an attempted law is outside the boundaries of the powers of the law-making body it is not a law. The judicial body does not make it not a law. The absence of lawmaking power makes the attempt unsuccessful and so not a law. The judicial body has no option. It must tell the truth as it deems it to be.

When 267 or more of the 531 in The Congress, however well intentioned, attempt a law beyond the powers of The Congress, they are outside their mandate from the 125,000,000 people and their action is not an Act of Congress. They represent the people, only when acting within the powers which they were elected to exercise.

When this attempt comes to the Court

for decision as to whether or not it is an Act of Congress, the adverse interests are the liberties of 125,000,000 people or the governing rights of the 48 States on one side and the grasping of 267 and not over 531 members of The Congress, on the other, for a power which the Constitution has not given to The Congress.

What reason can anyone advance why the right of a State to govern should be taken from it and given to these 267 men whenever three Justices of the Supreme Court think that the Constitution gives it to the 267, notwithstanding the fact that the other 264 and six of the Justices think that the Constitution leaves it with the State? What reason can be advanced why the decision of this judicial question should be transferred from the Court to a law-making body, however wise, not designed or accustomed to exercise judicial powers? Is it expedient to let men pass in final judgment on their own powers, with the practical result that the decision passes from a court accustomed to deal with judicial questions into the hands of the two men who complete the majority in a body not accustomed to deal with judicial questions and inevitably disposed to decide the question in favor of their own power and against the State, so as to put through a policy of government which they advocate? Such a transfer would in practical operation take from the State the powers which by the Constitution all agreed should remain with it.

It would take that power from the State whenever a majority of two, so voted.

EDWARD F. MCCLENNEN.

161 Devonshire Street,  
Boston, Massachusetts.  
February 22, 1936.

## A Self-Denying Cure for the Overcrowded Bar Problem

Editor American Bar Journal:

I have read many articles and heard numerous discussions of this and it is surprising to me that in none of them has any advocate suggested any other plan than to apply a limitation to the new and prospective students who may desire to pursue the profession of the Law. In all of them, a reservation is made to the effect that the proposed limitation shall not become effective as to present lawyers or students presently matriculating or enrolled in law schools. In all of them, there is an apology to the effect that the advocate is not trying to stifle competition and

feels that the exceptions contained in his proposal proves such. To my mind, if such advocates would apply the knife to themselves, their sincerity would be more convincing.

Assuming that there are too many lawyers now practicing and that for the next ten years the number will be far in excess of the volume of work available, perhaps this could be remedied in part as follows:

(1) Let some of the older men now actively engaged withdraw and retire from practice.

(2) Let "busy" lawyers relinquish some or many of the matters they now neglect in their inactive files and cases on which they cannot, for various reasons, give their best efforts.

(3) Let lawyers actually turn down or pass on to younger men or *less active* lawyers, new business (small and even large) to which they know they cannot devote the attention those matters and cases deserve.

If every lawyer weeded out one-fourth of such cases now cluttering the files and gave them to a lawyer or a group of lawyers who they knew could devote their time to them, such latter lawyers could become busy and the public's business would be attended to more promptly and perhaps with little loss to the withdrawing counsel—except the prestige of having to admit to a client that "I could not have advantageously done your work." This would be a huge admission and requires liberality of spirit to confess it.

I would welcome the thoughts of my fellow lawyers on these phases of the problem.

SIMON HORWITZ

Oshkosh, Wis., Dec. 11.

## "Why Not Abolish Terms?"

Editor, American Bar Association Journal:

This is the title to an editorial in the November number of the JOURNAL. Wisconsin practically did that very thing thirty years ago. The state constitution requires at least two terms of circuit courts each year; hence, the form of terms remains, but the practice was freed therefrom.

Chapter 6, Laws of 1905 (sections 252.09, 252.10, Wisconsin Statutes) declares that the circuit courts shall be open at all times, that every general term continues to the next general term, and that all unfinished business of a term is automatically continued to and proceeded with at the next term. Actions, civil and criminal, may be brought to trial at any time. In Wisconsin all time is term time. Justice is unhampered by "terms."

E. E. BROSSARD

Madison, Wis., Nov. 20.

# News of the Bar Associations

THE Bar Association of Arkansas is already making preparations for the Annual Meeting in 1936, which is to be held on May 1 and 2 at Hot Springs. The question of the Integrated Bar is being discussed in the State, and this will be the principal matter for action at the coming meeting. The program has not yet been completed, but it is understood that President Ransom, of the American Bar Association, has agreed to attend in case he can arrange his dates.

The Bar Association of Arkansas has shown an encouraging increase in membership during the past two years. It is now almost double what it was in 1934. Special attention has been paid during the past year to promoting the activities of Local Associations over the State and to stimulating their interest in and support of the State Bar Association.

Through some mischance no report of the Annual Meeting of the Association in 1935 appeared in the American Bar Association Journal. At that meeting Hon. Calvin T. Cotham, of Hot Springs, was elected President and Hon. J. F. Gautney, Vice-President. Roscoe R. Lynn was re-elected Secretary.

The program was unusually interesting, including addresses of welcome on behalf of the United States Government by Hon. Thomas J. Allen, Jr., Superintendent of Parks; for the City

of Hot Springs, by Hon. Leo P. McLaughlin, Mayor, and for the Garland County Bar Association, by Sydney S. Taylor, President. The response was made by Mr. E. B. Downie, of Little Rock. Mr. W. R. Donham, of Little Rock, introduced President Wiley, who delivered his address.

The afternoon of the first day was devoted to four separate meetings. At the first Mr. G. D. Henderson presided, and the subject discussed was "Federal Agencies, Banking, and Building and Loan Associations." Mr. Ed. F. McFaddin presided at the second, at which "Bankruptcy" was discussed, and Mr. Archer Wheatley presided at the third meeting, which considered "Taxation and Improvement Districts." The fourth

meeting was devoted to a consideration of "Personal Injury Practice," and Mr. W. R. Donham presided. Interesting addresses were delivered at all of these meetings.

At the session on Friday morning Hon. Justin Miller, Assistant Attorney General of the United States, spoke on the "Attorney General's Program for Crime Control," and Hon. Floyd E. Thompson, of Chicago, delivered an address on "The Lawyer's Place in American Life."

The remainder of the general program was made up of committee reports. At the banquet Mr. Ed. F. McFaddin, of Hope, Ark., presided as Toastmaster.

ROSCOE R. LYNN, Secretary.

## Indiana State Bar Association Unanimously Votes to Ask State Supreme Court to Provide by Rule for Admission to Bar and Discipline of Members

THE Indiana State Bar Association will ask the state Supreme Court to assert its inherent power and provide, by rule of court, for the regulation and control of the practice of law, it was decided at the annual mid-winter meeting of the Association held in Indianapolis on February 1st. The decision came with unanimous approval by the Association of the following report submitted by a special committee appointed at the annual summer meeting to study the subject:

"Mr. President and Members of the Indiana State Bar Association:

"Your special committee on 'The Inherent Power of Courts to License and Regulate the Practice of Law,' authorized by the Association at its 1935 meeting, begs leave to submit the following report:

"*First.* The committee is firmly of the opinion that the Supreme Court of Indiana has now ample authority to regulate, by rule or otherwise, the practice of law throughout the state, both as to admission to the bar and as to the disciplining, suspension and disbarment of its members.

"*Second.* The committee is further of the opinion that this prerogative of the Supreme Court is inherent and not dependent upon any legislative action for its existence or exercise.

"*Third.* It is also our conclusion that it is for the best interests of the bar of

this state and of the public, that such inherent authority be invoked by the State Bar Association to the end that proper steps be taken by the Supreme Court to exercise prompt and efficient supervision over the practice of law in Indiana.

"*Fourth.* It is our belief that the bench and bar of this state, as well as the public will welcome a program inaugurated by the Supreme Court for the purpose of remedying any abuses which may exist in the practice of law within its jurisdiction and thereby raise the standard of the profession and confirm it in public confidence and esteem.

"*Fifth.* Therefore, your committee respectfully recommends that the President of this Association, or others of its representatives, be authorized in the name and on behalf of the Indiana State Bar Association, to file with the Supreme Court of Indiana a petition requesting it to regulate and control the practice of law throughout the state by the adoption and promulgation of such rules and regulations as to it may seem appropriate, or by such other means and procedure as it shall deem advisable.

"*Sixth.* Your committee further recommends that in connection with such petition, this or a similar committee prepare and submit to the Supreme Court a brief, calling attention to the rights and authority of courts in such



HON. CALVIN T. COTHAM  
President, Bar Association of Arkansas

matters, as reflected in decisions of other states and jurisdictions, and the methods there adopted to accomplish the desired results.

"HENRY M. DOWLING, Chairman; ROY W. ADNEY, ALBERT L. RABB, DAVIS HARRISON."

The Association also has before it a plan of reorganization which has for its principal feature the nomination of officers and members of the Board of Managers by petition. This plan, intended to make the organization of the Association more representative was submitted by a special committee headed by William H. Hill of Vincennes. At the committee's suggestion action on the report was deferred until the annual summer meeting which will

be held at Lake Wawasee on July 10th and 11th.

Workings of the newly created Judicial Council were explained by Judge Curtis W. Roll of the Indiana Supreme Court, a member of the Council. Some of the definite recommendations which the Council will make probably will be presented at the summer meeting.

Austin V. Clifford of the Indianapolis Bar spoke on Section 77B of the Federal Bankruptcy Law at the afternoon session while Floyd E. Thompson, former Chief Justice of the Illinois Supreme Court, was the speaker at the annual banquet held in the evening. Judge Thompson's subject was "Constitutional Aspects of the New Deal."

THOMAS C. BATCHELOR, Secretary.

elected Chairman of this Section at its meeting last year, presided.

The Executive Committee tendered a dinner to the Presidents and representatives of the Federations of Bar Associations and Local Bar Associations. Martin Conboy was Chairman of the Special Dinner Committee.

The following morning at 9:30 o'clock the order of business as provided by subdivision II of the By Laws was continued. The session continued throughout the day, with sessions at the same hours on Saturday.

Friday evening, January 24, at 8:30 o'clock, Hon. John W. Davis, member of the New York Bar, delivered the annual address in the Ballroom of the Waldorf Astoria, speaking on "The Redistribution of Power."

Pursuant to provisions of Article XIII of the Constitution, the Executive Committee and the Chairman of the Special Committees selected the principal topic for discussion at the annual meeting, "Should Recent Economic Developments Lead Our Courts to Relax the Traditional Restrictions of the Federal Constitution?"

Yes—Thurman W. Arnold, Professor of Law, Yale University. No—Arthur E. Sutherland, Jr., of Rochester. This discussion was held Friday morning at 11 a. m., after which opportunity was afforded for general debate of the subject.

Hon. William L. Ransom, President of the American Bar Association, read a paper on the subject of "The Pending Plan for a Better Organization of the Bar."

Reports were then received from the Committees of the Association.

Hon. John Godfrey Saxe, of New York, was reelected President, Charles W. Walton, of Kingston and Albany, Secretary, and Harry M. Ingram, of Potsdam, Treasurer. Vice-presidents reelected include Allen Wardwell of New York, Jackson A. Dykman of Brooklyn, Joseph Rosch of Albany, Fred Linus Carroll of Johnstown, George H. Bond of Syracuse, Eugene Raines of Rochester, John Lord O'Brien of Buffalo and William F. Bleakley of Yonkers. Owen C. Becker of Oneonta was elected vice-president from the Sixth Judicial District, succeeding Leon C. Rhodes of Binghamton.

A meeting of the Judicial Section was held, presided over by the Chairman, Associate Justice John C. Crapser, of the Appellate Division, Third Department. There were also meetings of the District Attorneys' Section, presided over by President Nathan D. Lapham, and of the Corporation Counsel's Section, at which President Harold P. Burke presided.

## *New York State Bar Association Hears Debate on Relaxation of Traditional Constitutional Restrictions— Hon. John W. Davis Makes Address*

OUTSTANDING features of the Fifty-ninth Annual Meeting of the New York State Bar Association, held in New York City on January 23, 24 and 25, were the annual address, delivered by Hon. John W. Davis, on "The Redistribution of Power," and the debate on the question, "Should Recent Economic Developments Lead Our Courts to Relax the Traditional Restrictions of the Federal Constitution?," in which the affirmative side was taken by Professor Thurman W. Arnold of Yale University and the negative by Arthur E. Sutherland, Jr., of Rochester.

Mr. Davis' address, which has been widely circulated by the press, was a powerful attack on the present tendency toward government centralization and bureaucratic control of the activities of the citizen. The debate between Messrs. Arnold and Sutherland was on a subject of very present interest and importance which had been selected as a principal topic of discussion pursuant to the provisions of Article XIII of the Association's Constitution. Both of these addresses are printed in full in the current issue of the Bulletin of the New York State Bar Association.

The following account of the proceedings of the meeting is taken from that source.

There were three sessions. President John Godfrey Saxe called the meeting to order on Thursday afternoon at 2:00 p. m., at which time the report of the Committee on Amendments to the Constitution and By Laws was presented and acted upon, the reports of the Ex-



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President, New York State Bar Association

ecutive Committee, the Treasurer and the Committee on Nominations presented, and an adjournment taken to Friday at 9:30 a. m.

Immediately upon adjournment, there was a meeting of the section of this Association composed of the Presidents of the Federations of Bar Associations, the Committees on Character and Fitness, and Presidents of Local Bar Associations of the State. Addresses were made by Hon. Bernard L. Shientag, Justice of the Supreme Court, First Judicial District, and Dean Young B. Smith of Columbia Law School. Sol M. Stroock, New York City, who was

**Ohio State Bar Association Amends Constitution to Make Body More Representative—Proposed Amendment to State Constitution Relative to Appointment of Appellate Judges to Be Submitted to Bar Referendum—Addresses**

THOSE attending the Mid-Winter meeting of the Ohio State Bar Association at Toledo, Ohio on January 17 and 18, 1936, who had participated in meetings of the American Bar Association, might have thought they were attending a local or regional meeting of the national association, when speakers from the American Bar Association and subjects under consideration by that organization were on the program, which in general arrangement paralleled that of the American Bar Association.

President Wm. L. Ransom of the American Bar Association delivered two addresses, the first one to the Junior Bar Section of the Ohio State Bar Association, which was presided over by Joseph D. Stecher of Toledo, Vice-President of the Junior Bar Section of the American Bar Association, on "The Young Lawyer," and the other on "What the American Bar Association Can Do for the Average Lawyer" preceding the stag party, given by the Junior Bar of the Toledo Bar Association, to which all members of the Bar were invited.

Frank J. Hogan of Washington, D. C., a member of the Executive Committee of the American Bar Association, addressed the Friday noonday luncheon upon "Trials and Publicity," and spoke to the Junior Bar Section meeting, relating incidents in his trial experiences.

Boyle G. Clark of Columbia, Missouri, who addressed the American Bar Association Annual Meeting at Los Angeles at the meeting of the Unauthorized Practice of Law Committee, spoke to the Ohio State Bar Association Mid-Winter meeting on "Accomplishments of the Missouri Bar under Supreme Court Rule," and Howard D. Brown of Detroit, Michigan, Chairman of the American Bar Association Committee on Automobile Insurance, spoke to a group of insurance lawyers on "Organization, Purposes and Work of the Insurance Section of the American Bar Association."

Departing from the plan of former Mid-Winter meetings of the Ohio State Bar Association, President Charles W. Racine of Toledo arranged a two-day program which was comparable to that of the American Bar Association in having different meetings and sections held simultaneously, but not conflicting with the general sessions of the Association. Representatives of the Toledo

Bar Association ably assisted in making the Toledo Mid-Winter meeting operate smoothly, the attendance at which was large notwithstanding the severe weather which prevented many from attending owing to ice-covered highways.

The State Bar Association Constitution was amended to create a Council of Delegates composed of not less than two members from each local association or lawyers' club; the delegates from the Appellate Judicial Districts to receive nominations by petitions or nominate Vice-Presidents of the State Association and members of the Executive Committee, who are to be elected by mail ballot in appellate districts. The Vice-Presidents from each Appellate Judicial District will preside over meetings of the Council of Delegates in their respective districts. The State

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Bar Executive Committee were given authority to act for the Association during intervals between association meetings. The changes in the State Bar Association Constitution were adopted with the view of creating a more responsive and representative body of lawyers within the State Association.

The Toledo Mid-Winter meeting adopted that part of the report of the Committee on Judicial Administration and Legal Reform which presented an amendment to the Constitution of Ohio providing that the Judicial Council should recommend five names to the Governor as appointees for each vacancy on the Supreme Court or Courts of Appeals, the Governor to appoint from the list, the State Senate to confirm appointments and the incumbents to run upon their record at the expiration of a six-year term. This proposal will be submitted to state bar members by a mail referendum. A former referendum showed over 80 per cent of lawyers and approximately 70 per cent of the newspapers voting for appointive reviewing courts. The committee recommended that the Ohio Supreme Court be not divested of original jurisdiction in quo warranto, habeas corpus and prohibition, which recommendation was adopted as well as a statutory recommendation for substitute judges for that court.

The Committee on Unauthorized Practice of Law reviewed the recent decision in the case brought by the Mahoning County Bar Association against Youngstown trust companies, in which it was held that an attorney employed by a corporation cannot act as counsel or legal adviser to a patron of the corporation, and that the naming of a trust company in a fiduciary capacity in a will or trust agreement does not constitute such trust company a party having a direct and primary interest therein. The committee also reported upon the case of *Goodman et al. v. Beall et al.* pending before the Ohio Supreme Court to prohibit laymen from practicing before the Industrial Commission in workmen's compensation cases. The recommendations of the committee in favor of the Wagner Bill pending in Congress and in opposition to legislation licensing adjusters, were adopted.

The Committee on Integration or Reorganization of the Bar reported that sub-committees on integration and federation had been appointed and are expected to report upon the two plans of organization at the next summer meeting of the Association.

A Committee on Publications, appointed to consider duplication of advance sheets, printed reports, codes and textbooks and investigate law lists, re-

ported holding an organization meeting.

The two committees on Legal Ethics and on Grievances were abolished by the Association constitutional amendments and the duties of those two committees were transferred to a newly-created committee on Legal Ethics and Professional Conduct, in order to have the interrelated subjects handled by the same committee.

The Conference of Bar Association Delegates adopted a resolution, which was later approved by the general meeting of the Association, authorizing President Racine to appoint a committee to consider the financial condition and problems of local law library associations.

Other addresses at the Toledo Mid-Winter meeting were delivered by former Governor Albert C. Ritchie of Maryland on "The American Form of Government—Let Us Preserve It"; Former United States Senator James A. Reed of Missouri on "Innovations Upon the Constitution and Their Effects"; Fred C. Rector of Columbus on "Change Is Not Always Reform"; Wm. B. Stewart of Cleveland on "Roads Back to Governmental Slavery"; Morrison R. Waite of Cincinnati on "The Michigan-Ohio Boundary Dispute"; Attorney General John W. Bricker of Ohio upon "A Servant of the Court"; and Chief Justice Carl V. Weygandt of the Ohio Supreme Court on "Amici Curiae."

### State Bar of Oklahoma Elects Officers

AT the January meeting of the Board of Governors of the State Bar of Oklahoma, the following were elected as officers for the ensuing year:

Judge E. L. Richardson, Lawton, Oklahoma, President; Albert C. Hunt, Oklahoma City, First Vice-president; Logan Stephenson, Tulsa, 2nd Vice-president; Vol Crawford, Ada, 3rd Vice-president; W. T. Rye, Vinita, Treasurer. Mr. Reuel Haskell, Jr., of Oklahoma City was re-elected Executive Secretary.

Mr. F. B. H. Spellman, Alva, Oklahoma, was named Chairman of the Committee on co-ordination of State Bar with the American Bar Association, with Joe S. Lewis of Ponca City, T. Austin Gavin of Tulsa, Byrne A. Bowman of Oklahoma City and A. W. Trice of Hugo, as members.

Mr. Ben B. Blakeney, Jr., of Oklahoma City, was named Chairman of the State Committee on Unauthorized Practice of the Law with Mr. A. R. Thompson of Oklahoma City as Vice-chairman and Whit Y. Mauzy of Tulsa, Russel V. Johnson, Oklahoma City, Charles Hill Johns, Oklahoma City,



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President, State Bar of Oklahoma

V. J. Bodovitz, of Oklahoma City and Harry O. Glasser, Enid, as members.

In Oklahoma, the various Administrative Committees of the State Bar are the local committees on the Unauthorized Practice of the Law, with the exception of Tulsa and Oklahoma Counties, who have special committees.

Mr. Felix Duval of Ponca City was named as Chairman of the Judicial Council for Oklahoma.

Mr. Harris L. Danner of Oklahoma City was named Chairman of the Committee of State Bar Examiners.

Mr. F. B. H. Spellman of Alva was re-elected Editor in Chief of the Oklahoma State Bar Journal, with Mr. A. W. Trice of Hugo as Associate Editor.

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### *Rhode Island Bar Association Has Record of Important Accomplishments During Past Year*

THE Thirty-Eighth Annual Meeting of the Rhode Island Bar Association was held at the Turks Head Club, Providence, R. I., December 2, 1935. President Chauncey E. Wheeler presided and there were present approximately 120 members.

President Wheeler read a report of the activities of the Association during the year calling attention in particular to three fields of activity.

The first of these was the part taken by this Association in arranging for the presentation of arguments to the Supreme Court stressing both sides of the contentions as to the legality of a Constitutional Convention in the State of Rhode Island. As friends of the Court and at the request of this Association, Patrick H. Quinn and William A. Graham argued in favor of the legality of such a Convention, and Frederick W. Tillinghast and Elmer S. Chace argued the other side. President Wheeler called attention to the fact that the Court had thanked the Association for its co-operation in this regard. The opinion of the Court appears as *In Re Opinion of Governor*, 178 Atlantic 433.

In the second place, President Wheeler called the attention of the Association to accomplishments in the field of the unauthorized practice of the law by persons not members of the Bar. The Committee in this field, of which Judah C. Semonoff was Chairman, in conjunction with Clarence N. Woolley, Patrick H. Quinn, Henry B. Gardner, Jr., and Paul R. McIntyre, was instrumental in bringing an action to restrain the unlawful practice of the law by an automobile service agency. The President called attention to the excellent opinion of the Supreme Court of Rhode Island in *Rhode Island Bar Association et al. vs. Automobile Service Association, et al.* 179 Atlantic 139, resulting from the activities of the Association. He stated that he felt that the principles therein established and the jurisdiction of the Court therein set forth would be of great value not only to the Bar of the State of Rhode Island, but to the Bar of the country at large, in protecting the public against advice from persons who, by the nature of their positions, could not give adequate counsel.

The third accomplishment stressed by President Wheeler was the approval by the Supreme Court for adoption, of rules relating to disciplinary action against members of the Bar. He called



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attention to the fact that the present rules, revolving about the Complaint Committee of the Supreme Court and the Grievance Committee of the Bar Association were antiquated and did not properly cover the field. He then gave a resumé of the rules to be adopted by the Supreme Court stating the substance of these rules with the concurrence of the Court. By these rules the Supreme Court will appoint a Complaint Committee of five, which shall sit as a judicial body, hearing such complaints against members of the Bar as may come before it, making judicial findings in relation thereto, and reporting its recommendations to the Supreme Court for final determination and action by that tribunal. There will also be an Investigating Committee, consisting of nine members of the Bar holding office for terms of three years each. Any complaint against a member of the Bar will be filed with the Chairman of that Committee who will then designate a member or members to investigate the complaint in such fashion as that person sees fit. A report will then be made back to the Committee and by concurrence of a majority of the Committee, the complaint will either be dismissed or found to be the basis for further action.

If the complaint be dismissed, the complainant may of his own accord, proceed with the same before the Complaint Committee, but he does so without further connection with the Investigating Committee. On the other hand, if a majority of the members of the Investi-



CHAUNCEY E. WHEELER  
President, Rhode Island Bar Association

gating Committee shall decide that the complaint has merit and should be further heard, a member or members of that Committee designated for that purpose shall act as counsel and prosecute the matter before the Complaint Committee. Jurisdiction is also given to the Investigating Committee to take cognizance of instances of unprofessional conduct at the instance of any Court, the Attorney General, or of its own motion. The President called attention to the fact that after the establishment of these two Committees the Grievance Committee of the Rhode Island Bar Association would cease to exist.

He stressed the fact that the system as approved by the Court brought about two most desirable reforms. In the first place, by providing a speedy investigation in an informal fashion by the Investigating Committee it will result in early dismissals of unwarranted complaints against members of the Bar or adjustment of misunderstandings, in such fashion as to relieve the lawyer involved of embarrassment and unfair accusation. In the second place, in regard to conduct which is seriously unprofessional, it will provide a system whereby a competent member of the Bar will have it as his duty to present the facts to the tribunal designated to hear such complaints, thus doing away with a system which, in the past, had often produced the anomalous situation where an illiterate complainant, unacquainted either with legal terms or procedure, was found to be the complainant before a judicial tribunal where the defendant, himself a member of the Bar,

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appeared represented by another member of the Bar as counsel.

President Wheeler stated that he felt that the adoption of these rules would be a great step forward in the field involved and that he was very proud of the fact that the Association could claim the credit of the drafting of these rules and of having persuaded the Court to adopt them. He called attention to the fact that activity in this field had extended over a period of years, and said that he was pleased that the result had at last been attained.

Reports from the following Standing and Special Committees were rendered by their Chairman, as follows: Harold A. Andrews, Committee on Amendment of the Law; Herbert M. Sherwood, Judiciary Committee; John C. Knowles, Committee on Grievances; Sidney Clifford, Committee on Relations with American Bar Association; Frederick W. Arnold, Committee on Annual Report; Kirk Smith, Committee on Legal Aid; Hon. Theodore Francis Green, Committee on American Law Institute; Judah C. Semonoff, Committee on Unlawful Practice of the Law; Francis B. Keeney, Joint Committee on Co-operation with Banks and Trust Companies; James C. Collins, Joint Committee on Medico-Legal Practice and Medical Evidence; William B. Greenough, Committee on Ethics.

The Association unanimously voted an expression of its appreciation of the service rendered the Association, the Bar, and the people, by those who had appeared on its behalf as friends of the Court and as counsel in relation to the Opinion to the Governor on the question of the Constitutional Convention and in connection with the case of Rhode Island Bar Association vs. A. S. A.

The following officers were unanimously elected for the ensuing year: President, Chauncey E. Wheeler; First Vice-President Frederick W. O'Connell; Second Vice-President, Herbert M. Sherwood; Secretary, Fred B. Perkins; Treasurer, Andrew P. Quinn. Executive Committee: Henry C. Hart, Chairman; Ralph M. Greenlaw, Thomas F. Black, Jr., Judah C. Semonoff, Laurence J. Hogan.

FRED B. PERKINS, Secretary.

